RECORD AND BRIEFS

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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC

PETITIONERS,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit, over the compelling dissent of Judge Jeffrey S. Sutton, misinterpret this Court's unanimous decision in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), and thus create conflicts both with the decisions of other circuits and within the Sixth Circuit itself, by employing rules of contract interpretation explicitly repudiated in *Tackett* to deem a general duration clause in the Collective Bargaining Agreement ambiguous, and then using extrinsic evidence to hold the healthcare benefits of the retiree class vested for life?

PARTIES TO THE PROCEEDINGS

Petitioners are CNH Industrial N.V. and CNH Industrial America LLC ("CNH"). Respondents are a class of former CNH employees who retired from CNH after 1 July 1994 and before 1 April 2005, and their spouses ("Retirees"). The class is represented by individual retirees Jack Reese, James Cichanofsky, Roger Miller, and George Nowlin.

CORPORATE DISCLOSURE STATEMENT

Petitioner CNH Industrial N.V. is a publicly traded entity that is the ultimate parent of Petitioner CNH Industrial America LLC. Respondents are individuals. No other publicly traded entity has a financial interest in the outcome of this appeal.

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PETITION FOR WRIT OF CERTIORARI

CNH Industrial N.V. and CNH Industrial America LLC respectfully submit this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, App. 1, is published at 854 F.3d 877 (6th Cir. 2017) (*Reese III*), *reh'g en banc denied*, App. 112. The operative final judgment of the United States District Court for the Eastern District of Michigan, App. 85, issued on reconsideration of its earlier grant of summary judgment, App. 40, is published at 143 F. Supp. 3d 609 (E.D. Mich. 2015).

JURISDICTION

Under 28 U.S.C. § 1291, the Sixth Circuit had jurisdiction to review the final judgment of the United States District Court for the Eastern District of Michigan. The Sixth Circuit entered its judgment on 20 April 2017. App. 1. CNH and the Retirees filed timely cross-petitions for rehearing en banc, both of which the Sixth Circuit denied on 28 August 2017. App. 112. This petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Petitioners and their corporate predecessors (collectively "CNH") manufacture construction and agricultural equipment. Respondents are a class of CNH retirees ("the Retirees"), all of whom retired after 1 July 1994 and before 1 April 2005, and their spouses. The Retirees were represented in their labor negotiations with CNH by the United Automobile, Aerospace, and Agricultural Workers of America (the UAW).

Beginning in 1971, the UAW and CNH negotiated and agreed to a series of collective bargaining agreements (CBAs) covering CNH employees. Each CBA contained a general durational clause providing that the CBA would "continue in full force and effect" until a date certain. *E.g.*, App. 115. Each CBA also provided that the written agreement "disposes of any and all bargaining issues, whether or not presented during negotiations." *E.g.*, App. 115.

In 1994, the prior owner of the company sold its assets into the entity now known as CNH, and the successor entity assumed the prospective obligations of the existing CBA. *See Reese v. CNH Am. LLC*, 574 F.3d 315, 318 (6th Cir. 2009) ("*Reese I*"). That existing CBA was initially entered in 1990, and was extended in November 1993 into 1995. In the first CBA entered by the new entity in 1995, the Group Benefit Plan ("GBP") provided that all employees who retired after 1 July 1994 (the date of the restructuring)—even those who had retired under

the 1993 extension—"shall be eligible for Group benefits as described" in the GBP. Doc. 129-31 at 6295 (1995 GBP). The 1995 GBP "r[a]n concurrently with" the 1995 CBA, which continued until March 1998, and also contained an integration clause.[1]

In May 1998, CNH and the UAW entered the CBA and GBP at issue here, with a specified termination date of 2 May 2004. App. 115. The 1998 GBP "r[a]n concurrently with" the 1998 CBA, and also contained an integration clause. App. 114. Like the 1995 plan, the 1998 GBP provided health benefits as follows:

> Employees who *retire* under the [CNH] Pension Plan for Hourly Paid Employees *after 7/1/94*, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group Benefits as described in the following paragraphs.

App. 116 (emphasis added); *see also* App. 4 (emphasis added). All members of the Retiree class—whether they retired under the 1993 CBA extension, the 1995 CBA, or the 1998 CBA—receive their benefits under the 1998 CBA and GBP. The 1998 CBA and GBP expired by their terms on 2 May 2004. Subsequent

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[1] The 1993 and 1995 CBAs also incorporated Letters of Understanding (the "cap letters") stating, in relevant part, that CNH's annual per capita cost of providing the benefits would be capped at specified amounts, but also providing that "no covered person" would be required to pay "a portion of the excess amount" until a specified future date. Doc. 125-6 at 4438 (Extension Agmt.); Doc. 125-8 at 4560 (1995 Tent. Agmt.). The cap letters were eliminated in the 1998 CBA.

agreements between CNH and the UAW do not provide benefits to this Retiree class, but the benefits under the 1999 plan have continued due to this litigation.

The 1998 CBA and GBP changed the Retirees' benefits in several important ways. Whereas earlier CNH insurance programs provided indemnity coverage, the 1998 plan imposed managed care on all Retirees in the class, even those who had already retired under earlier CBAs. App. 116. The 1998 plan also incorporated a "Letter of Understanding" in which "the Company and the Union agreed" that "retirees who are enrolled" in a medical plan "will not have to pay any additional employee contributions above those which may be required for enrollment" "*over the term of the 1998 labor agreement.*" App. 118 (emphasis added). Finally, the 1998 CBA contained a Letter of Understanding addressing "National and State Health Insurance Initiatives." That Letter allowed CNH to modify the benefits provided under the GBP "to integrate or eliminate the duplication" of benefits provided in any subsequently enacted Federal or State health security act." App. 117–18.[2]

B. Procedural History

The decision below is the Sixth Circuit's third decision in this case. In early 2004, CNH sought a declaratory judgment from the United States District Court for the Eastern District of Wisconsin, adjacent

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[2] Pursuant to this provision, effective 1 January 2015, CNH required Medicare-eligible Retirees to participate in the Medicare Part D prescription drug program, at no increased cost to the Retirees but with considerable savings to CNH. Doc. 423-4 (Burchfield Ltr.)

to CNH's headquarters in Racine, that the 1998 CBA permitted it to modify or eliminate the Retirees' health benefits. The Retirees counter-sued in the Eastern District of Michigan, even though CNH had no employees or facilities within the Sixth Circuit, so the Retirees could take advantage of the "*Yard-Man* presumption" that retiree healthcare benefits were vested. *See UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). The Retirees sought a declaratory judgment that the benefits were vested, as well as an injunction preventing CNH from changing the benefits. After a forum fight, the case proceeded in the Eastern District of Michigan.

In 2007, the district court granted summary judgment in favor of the Retirees, ruling based on *Yard-Man* that the 1998 CBA promised vested retiree healthcare benefits. As this Court recognized in *Tackett*, the *Yard-Man* line of decisions created an effective "presumption" in favor of vesting. *Tackett*, 135 S. Ct. at 935 (citing *Cole v. Arvin-Meritor, Inc.*, 549 F.3d 1064, 1074 (6th Cir. 2008)).

The Sixth Circuit affirmed the vesting decision, also based on the *Yard-Man* presumption. *Reese I*, 574 F.3d at 322–23. But it also held that the CBA did not preclude CNH from making reasonable unilateral changes to the benefits if certain criteria were met, *id.* at 327, and remanded the case for consideration of proposed changes.

On the first remand, the district court ruled that CNH could not unilaterally modify the benefits and again granted summary judgment for the Retirees. *Reese v. CNH Global N.V.*, No. 04-70592, 2011 WL 824585 (E.D. Mich. March 3, 2011). On the second

appeal, the Sixth Circuit held that the district court had "misread the panel opinion" in *Reese I*, and accordingly reversed and remanded with further instructions for determining whether CNH's proposed benefit changes were reasonable. *Reese v. CNH Am. LLC*, 694 F.3d 681, 685–86 (6th Cir. 2012) ("*Reese II*").

During the second remand, this Court decided *Tackett*, which abrogated the Sixth Circuit's *Yard-Man* rules. Based on *Tackett*, CNH moved for summary judgment on vesting, arguing that under *Tackett* and ordinary principles of contract law the CBA and GBP do not promise vested benefits. Initially, the district court granted summary judgment to CNH, App. 85, but after the Retirees moved for reconsideration, the district court reversed itself and entered summary judgment for the Retirees, App. 40.

While CNH's third appeal was pending, the Sixth Circuit decided *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 375 (2016).[3] In that decision, the Sixth Circuit followed the ordinary contract principles set forth in *Tackett* and concluded that the contract at issue did not promise vested benefits for life. *Id.* at 268–69. Key to the holding was that "nothing in ... the CBAs say[] that Moen committed to provide unalterable

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[3] On remand from this Court, the Sixth Circuit further remanded *Tackett* to the district court. *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204 (6th Cir. 2016) ("*Tackett III*"). In its remand order, the *Tackett* panel made a number of observations in dicta that have sown confusion in subsequent decisions. *See* pp. 20–21 & n.7 below.

healthcare benefits to retirees and their spouses for life" and that "everything [the CBAs] say about the topic [of retiree benefits] was contained in a [time-limited] agreement." *Id.* at 269. "Absent a longer time limit in the context of a specific provision," the court held, "the general durational clause supplies a final phrase to every term in the CBA: 'until this agreement ends.'" *Id.* (citing *Tackett*, 135 S. Ct. at 936). The Sixth Circuit denied rehearing in *Gallo*, and this Court denied the retirees' petition for a writ of certiorari. 137 S. Ct. 375 (2016).

On 20 April 2017, the panel in this case and two other panels of the Sixth Circuit issued decisions addressing the vesting of retiree benefits. *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017) ("*Cole II*"); *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017); *Reese III*, App. 1.[4] The *Cole II* panel followed *Tackett* and *Gallo*, and unanimously concluded that the durational clauses in those CBAs precluded vesting. *See* 855 F.3d at 700 ("*Gallo* is legally indistinguishable from the present case."). But the panels in this case and in *Kelsey-Hayes*, both over vigorous dissents, refused to follow the general durational clauses, determined that the CBAs were ambiguous, and, after reviewing parol evidence, concluded that the benefits were vested.

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[4] Judge Gibbons, who authored the *Reese III* decision, concurred in the denial of rehearing in *Kelsey-Hayes*. She pointed out that the three "opinions were filed, by cooperation of all three panels, on the same date." *UAW v. Kelsey-Hayes Co.*, No. 15-2285 (6th Cir., Sept. 22, 2017) (Gibbons, J., concurring in denial of rehearing).

In the opinion below, the Sixth Circuit concluded that the CBA was ambiguous on the vesting issue. It discerned the ambiguity because certain other benefits had specific durational clauses, whereas the Retiree health benefits continued beyond each employees' retirement but the agreement was "silent on whether the [retiree health] benefits continue past the termination date of the agreement." App. 11. It also discerned ambiguity from the CBA's "tying of benefits to [the] achievement of pensioner status." App. 12. Although it conceded that *Tackett* instructs the court "not [to] infer vesting from silence" or "from the tying of benefits to achievement of pensioner status," it surmised that *Tackett* does *not* preclude using silence or tying of health benefit eligibility to pension eligibility to *find ambiguity*. *Id.*

By holding the written instruments ambiguous, the court said, it was "allow[ed] to explore the extrinsic evidence to discover what the parties actually intended." *Id.* That extrinsic evidence convinced the court that CNH had agreed to provide healthcare for the lifetimes of the Retirees and their spouses. App. 13–14.

Judge Sutton dissented, pointing out that the majority opinion "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." App. 28 (Sutton, J., dissenting). In addition to noting that the majority had ignored the CBA's integration clause, he pointed out that the ordinary contract principles set forth by *Tackett* "should make quick work of this case." App. 24. Because the contract "*never* promises lifetime healthcare benefits," and is at best "silent as to the

length of the commitment" to provide those benefits, "'a court may not infer that the parties intended those benefits to vest for life.'" *Id.* (quoting *Tackett*, 135 S. Ct. at 936–37). He rejected the majority opinion's determination of ambiguity, pointing out that the contract could be ambiguous only if it were susceptible to more than one fair reading, but any reading based on inferences rejected in *Tackett* was not a fair reading. "A forbidden inference cannot generate a plausible reading." App. 32. He concluded by showing that this decision is inconsistent with decisions on vesting of retiree health benefits by the Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits. App. 35–36.

Although requested to resolve the conflict between *Gallo* and *Cole*, on the one hand, and *Tackett III*, *Reese III*, and *Kelsey-Hayes*, on the other hand, especially the divergent treatment of durational clauses, the Sixth Circuit denied petitions for rehearing in all three cases decided on 20 April 2017, as it had before in *Gallo*. The denial of rehearing in *Kelsey-Hayes* drew concurring opinions by Judge Gibbons and Judge Sutton, as well as a dissent by Judge Griffin, who was joined by Judge Gilman. Judge Gibbons' concurrence contended that the three decisions, and *Gallo*, are legally consistent although factually distinguishable, but shared Judge Sutton's concern that en banc review "would not yield any productive results." *Kelsey-Hayes*, No. 15-2285, slip op. at 2–3. Judge Sutton concurred even though "[b]y nearly every measure, this case deserves en banc review.... An intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en

banc review." *Id.* at 4 (Sutton, J., concurring in denial of rehearing en banc). He reluctantly concurred in denial of rehearing, however, because in this instance "there is good reason to fear that a majority of the en banc court would fail to agree on a majority view." *Id.* Judge Griffin, joined by Judge Gilman, dissented on the ground that "[o]ur post-*Tackett* case law is a mess," with the decisions "in irreconcilable conflict regarding how courts are to view durational clauses." *Id.* at 5, 6 (Griffin, J., dissenting from denial of rehearing en banc). Further, Judge Griffin noted, "the issue of retiree healthcare guarantees presents a question of exceptional importance," warranting en banc review. *Id.* at 8. With denial of rehearing in *Kelsey-Hayes*, the Sixth Circuit has now declined *four* times to reconcile its decisions with *Tackett*, with decisions of other circuits, and with each other.

REASONS FOR GRANTING THE PETITION

Less than three years ago, in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), this Court unanimously resolved a long-standing conflict between the Sixth Circuit and all other circuits. The Court rejected the Sixth Circuit's presumption that collectively-bargained retiree healthcare benefits are vested and unalterable for life. The Court ruled that "ordinary principles of contract law" must govern vesting determinations, and set forth several such principles to guide the lower courts. Both the Third and Fourth Circuits have properly interpreted and applied *Tackett*, ruling that a general durational clause must be given effect unless the collective bargaining agreement says otherwise.

In the decision at issue here, however, the Sixth Circuit misinterpreted *Tackett* and, over the vigorous dissent of Judge Sutton, relied on rules of contract interpretation repudiated in *Tackett*. With this ruling, the Sixth Circuit once again brought itself into conflict with decisions of other circuits issued both *before Tackett* and *after Tackett*. Just as striking, this decision conflicts with other decisions of the Sixth Circuit that have properly interpreted and applied *Tackett*. Notwithstanding *four* rehearing petitions asking the en banc court to resolve the conflicts, the Sixth Circuit has declined to do so. Indeed, two Sixth Circuit judges concurring in the most recent denial of rehearing opined that en banc rehearing would be futile in resolving the conflict.

Thus, this decision has created both an *inter*-circuit and an *intra*-circuit conflict about what *Tackett* means. The predictable consequence is that district courts within the Sixth Circuit are issuing inconsistent decisions, retirees once again have an incentive to forum shop their vesting disputes in the Sixth Circuit, and employers continue to face great uncertainty about their retiree health benefit liabilities, which for an individual employer can total hundreds of millions or even billions of dollars. Because the Sixth Circuit has declined to use its en banc process to reconcile its own decisions with *Tackett*, decisions of other circuits, or even those of its own court, Petitioners CNH Industrial America LLC and its parent CNH Industrial N.V. urge this Court to grant review and resolve these conflicts.

I. THE SIXTH CIRCUIT MISINTERPRETED *TACKETT*.

A. *Tackett* Repudiated All *Yard-Man* Presumptions, Inferences, and Rules of Construction.

Tackett was unequivocal in its unanimous rejection of the presumptions, inferences, and rules of construction created by *Yard-Man* and its progeny. Of particular relevance here, the Court rejected the notion that "'a general durational clause says nothing about the vesting of retiree benefits,'" 135 S. Ct. at 935 (quoting *Noe v. PolyOne Corp.*, 520 F.3d 458, 555 (6th Cir. 2008)). The Sixth Circuit's "refus[al] to apply general durational clauses to provisions governing retiree benefits," and its requirement that a CBA must include "a specific durational clause for retiree health care benefits to prevent vesting," had the effect of "distort[ing] the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Tackett*, 135 S. Ct. at 936. This Court further rejected—twice—the notion that tying "'eligibility for retirement-health benefits to eligibility for a pension'" suggests that health benefits are vested. *Id.* (quoting *Noe*, 520 F.3d at 558); *see also* 135 S. Ct. at 937 (rejecting "tying of eligibility for health care benefits to receipt of pension" as "suggest[ing] an intent to vest health care benefits"). The Court rejected these and other rules as contrary to "ordinary principles of contract law." 135 S. Ct. at 930, 937.

But this Court went further. It set forth the key principles of contract law that it expects to guide

vesting decisions. Congress made a clear decision to exempt welfare plans providing health benefits from ERISA's vesting requirements. For this reason, the Court emphasized, the "rule that contractual 'provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.'" 135 S. Ct. at 933 (citation omitted). Indeed, the written language of the plan is "the linchpin" of the entire welfare benefits system, encouraging employers to provide those plans in the first place. *Id.* It is a "principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 936. The Court also pointed to "the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (citation omitted).

In addition to the importance of enforcing agreements as written, the Court further stressed "the traditional principle that courts *should not* construe ambiguous writings to create lifetime promises," and warned that "when a contract is silent as to the duration of retiree benefits, a court *may not* infer that the parties intended those benefits to vest for life." *Id.* at 936, 937 (emphasis added). The Court cited with approval the Sixth Circuit's decision addressing non-collectively-bargained retiree health benefits, which held that any intent to vest "'must be found in the plan documents and must be stated in clear and express language.'" *Id.* at 937 (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)). Benefits can vest if the CBA "'provide[s] in explicit terms that certain benefits continue after the agreement's expiration.'" 135

S. Ct. at 937 (quoting *Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 207 (1991)).[5]

B. The Sixth Circuit's Decision Resurrects *Yard-Man* Rules Rejected in *Tackett*.

The lower court's disregard of *Tackett* is plain enough: it revived two rules of construction from the *Yard-Man* era, both of which this Court explicitly rejected in *Tackett*, for the purpose of creating a contractual ambiguity.

The court first misinterpreted *Tackett* by refusing to heed the durational clause. The court observed that the CBA allowed health coverage to continue *beyond retirement*, but was *silent* on

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[5] The Court cited *Litton's* holding that a contract term requiring layoffs in reverse order of seniority did not continue beyond the expiration of the CBA. 501 U.S. at 210 ("We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration."). In her concurrence, Justice Ginsburg quoted other language from *Litton* suggesting that a continuing duty might arise from "implied terms of the expired agreement." *Tackett*, 135 S. Ct. at 938 (quoting *Litton*, 501 U.S. at 203 (Ginsburg, J., concurring). In *Litton*, the Court relied on "[t]he Agreement's unlimited arbitration clause," 501 U.S. at 205, to require post-expiration arbitration of disputes arising under the CBA. *See also id.* at 204 (reiterating this Court's "presumption in favor of postexpiration arbitration of matters" so long as "th[e] arbitration was of matters and disputes arising out of the relation governed by contract"). *Litton* thus recognizes the important distinction between continuation of a *dispute resolution mechanism* for disputes arising under the CBA even after expiration of a CBA which can be "*implied,*" and continuation of a "*benefit*" that was based on, and expired with, the CBA, which requires "*explicit*" language.

whether the benefits continued past the CBA's termination date. Although purporting to acknowledge that "the Supreme Court has commanded that we not infer vesting from silence," App. 12, the lower court said in this case, the "silence, rather than resolving ambiguity, furthers it," App. 30. Based on that perceived ambiguity, the lower Court seized on extrinsic evidence as supporting a promise of lifetime health benefits, notwithstanding this Court's instructions that adherence to the written agreement is "'especially appropriate'" in this context, *Tackett*, 135 S. Ct. at 933 (citation omitted), and that "courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936 (emphasis added).

This reasoning flouts *Tackett* in three ways. First, *Tackett* rejected the notion that "a specific durational clause for retiree health care benefits [was necessary] to prevent vesting." *Id.* at 936. Such a rule "distort[s] the text of the agreement." *Id.* Contrary to the lower court's ruling, the absence of a specific durational clause for the health benefits leaves them subject to the general durational clause. Second, the lower court used "silence" about the duration of the health benefits to find an ambiguity, and then used extrinsic evidence to find vesting. *Tackett* made clear, however, that "a court may *not infer* [from silence] that the parties intended those benefits to vest for life," *id.* at 937 (emphasis added), and "courts should not construe ambiguous writings to create lifetime promises," *id.* at 936. Third, as Judge Sutton pointed out in his dissent, the CBA *does* contain a specific limitation on the retiree health benefits: "The agreement says that the Group

Benefit Plan '*will run concurrently* with this Agreement, and is hereby made part of this Agreement.'" App. 26 (Sutton, J., dissenting).

The lower court's second ground for finding ambiguity also misconstrues *Tackett*. Although recognizing that *Tackett* "directed us not to infer vesting from the tying of benefits to achievement of pensioner status," the lower court nevertheless reasoned that such tying may render an otherwise clear agreement ambiguous. The lower court understood what it was doing: "Inferring vesting from tying alone violates *Tackett* and ordinary principles of contract interpretation. *Finding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended.*" App. 12 (emphasis added).

Again, this approach undermines the ruling in *Tackett*. *Tackett* made clear—twice—that tying eligibility for health care to eligibility for a pension was *not* evidence of vesting. 135 S. Ct. at 935, 937. If tying cannot support an inference of vesting, then it cannot create an ambiguity in a CBA that is otherwise unambiguous on the issue of vesting. As Judge Sutton put it in dissent, "[a] forbidden inference cannot generate a plausible reading." *See* App. 32 (Sutton, J., dissenting). Nor can this tying analysis overcome CNH's well-supported motion for summary judgment against vesting, because tying is not probative evidence of vesting. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249–50 (1986) (party opposing summary judgment must come forward with probative and admissible evidence sufficient to prove the disputed element of its case).

In addition to misinterpreting *Tackett*, the lower court also failed to address another undisputed indication of non-vesting. As shown (pp. 3–4 above), each successive CBA entered by CNH and the UAW since the 1994 reorganization extended retiree health benefits to all persons who had retired since "7/1/94." Thus, all the class members—whether they retired under the 1993 extension agreement, the 1995 CBA, or the 1998 CBA—are receiving their benefits under the 1998 CBA, which expired in 2004. The UAW and CNH "re-upped" the benefits in both the 1995 and 1998 bargaining cycles. If the benefits were vested for life under the CBA in effect at the time of retirement, it would have been unnecessary for the parties to include healthcare benefits in successive bargaining agreements for previously retired persons. App. 33 (Sutton, J. dissenting) (renegotiation of benefits in each CBA "indicates that they would have to be reset again when this agreement expired."). In the 2004 bargaining cycle however, the UAW deviated from the prior practice by refusing to negotiate for the existing Retirees, and they are not included in subsequent agreements. Thus, their benefits expired with the 1998 agreement in 2004.

In his dissent, Judge Sutton emphasized that the CBA "*never* promises lifetime healthcare benefits." App. 25 (Sutton, J. dissenting). He tracked the "traditional principles" set forth by this Court in *Tackett*, noting that the benefits expired with the CBA, that silence could not create vesting, and that an ambiguous contract could not support a lifetime promise. *Id.*

Review of the *Reese* decision is imperative to correct a plain misinterpretation of *Tackett*.

II. REVIEW IS NECESSARY TO RESOLVE BOTH AN INTER-CIRCUIT AND AN INTRA-CIRCUIT SPLIT OF AUTHORITY.

A. The Lower Court Decision Creates Conflicts Among the Circuits.

The lower court's decision not only returns the law of vesting to its unsettled state before *Tackett*, it also adds a new wrinkle: a conflict among the circuits about what *Tackett* itself means. Both inter-circuit conflicts justify grant of this petition. *See* S. Ct. R. 10(a).

Judge Sutton's dissent in the decision below compellingly demonstrates the inter-circuit conflict resurrected by the panel's decision. He pointed out that the decision "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." App. 28. To demonstrate the conflict, he quoted from pre-*Tackett* decisions of the Second, Third, Fifth, Seventh, and Eighth Circuits.[6] "I fear that we, again, are out of step." App. 36.

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[6] App. 35–36. Judge Sutton quoted from the following decisions: *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 147 (3d Cir. 1999); *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993); *Senn v. United Dominion Indus. Inc.*, 951 F.2d 806, 816 (7th Cir. 1992); *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767, 770 (8th Cir. 2004). Two additional circuits appear in conflict. *See Turner v. Local Union No. 302, Int'l B'hd of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979) (benefits not vested when

Equally important, the Sixth Circuit's decision in this case deviates from the recent decisions of the Third and Fourth Circuits, which correctly interpreted *Tackett* and enforced general durational clauses. Whereas the lower court here construed *Tackett* as allowing a finding of ambiguity if the retiree health benefits were not subject to a specific durational clause, and when the CBA "ties" eligibility for retiree health benefits to eligibility for a pension, the Third and Fourth Circuits have interpreted *Tackett* to require enforcement of the general durational clause.

In *Grove v. Johnson Controls, Inc.*, — F. App'x —, 2017 WL 2590762 (3d Cir. 2017) (unpublished), the Third Circuit rejected vesting on the ground that "any obligation on Johnson Controls' part terminated with the expiration of the collective bargaining agreement." *Id.* at *3. Even for subclasses that were promised benefits until "Death," the CBA meant only that "no further benefits are available if [a retiree] dies before the agreement expires," but did not promise the benefits beyond expiration of the CBA. *Id.* at *4.

Likewise, in *Barton v. Constellium Rolled Products-Ravenswood, LLC*, 856 F.3d 348 (4th Cir. 2017), the Fourth Circuit held that the "explicit

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"[n]one of the documents establishing the health and welfare benefits made any representation as to the length of the period during which these benefits would continue to be paid, other than 'throughout the term of this agreement'"); *Coffin v. Bowater, Inc.*, 501 F.3d 80, 97 (1st Cir. 2007) (retirees not entitled to lifetime health coverage under CBAs containing unambiguous durational clause for benefits).

durational language stating that the retiree health benefits continue 'for the term of' the governing CBA" precluded vesting. *Id.* at 352. Although the retirees asserted that other provisions of the CBAs and the Summary Plan Descriptions issued for their benefits created ambiguities about vesting, the Fourth Circuit repeatedly invoked the "robust durational language" as precluding vesting. *Id.* at 355.

The Sixth Circuit's ascertainment of an ambiguity cannot be reconciled with the instruction of *Tackett* to give effect to the durational clause or the decisions in *Grove* and *Barton* adhering to that instruction. Grant of the petition is necessary to resolve these conflicts among the circuits.

B. The Sixth Circuit's Decision Also Creates a Conflict Among Decisions Within the Sixth Circuit.

As Judge Richard Allen Griffin recently wrote, the Sixth Circuit's "post-*Tackett* case law is a mess," and its "decisions are in irreconcilable conflict." *Kelsey-Hayes*, No. 15-2285, slip op. at 5, 6 (Griffin, J. dissenting from denial of rehearing). Although it is the duty of each circuit to maintain uniformity among its own decisions through the en banc process, *see* Fed. R. App. P. 35(a)(1) ("secur[ing] or maintain[ing] uniformity of the Court's decisions" is ground for en banc consideration), the Sixth Circuit has steadfastly refused to reconcile its post-*Tackett* decisions.

The conflicts began almost immediately after this Court remanded *Tackett* to the Sixth Circuit with instructions to "apply ordinary principles of

contract law." 135 S. Ct. at 937. On remand, the Sixth Circuit remanded the case back to the district court. *Tackett III*, 811 F.3d 204. In so doing, however, the Sixth Circuit ventured a number of propositions that have sown confusion and discord into subsequent decisions.[7] For example, the court opined that "we ... cannot presume that the absence of such specific language [in a general durational clause], by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest." *Id.* at 208, 209.

In three decisions, the Sixth Circuit has properly interpreted *Tackett* and held that, in the absence of specific language vesting the benefits, the durational clauses precluded vesting. In *Gallo v. Moen*, 813 F.3d 265 (6th Cir. 2016), the court reversed a lower court summary judgment ruling that the benefits were vested and held as a matter of law that the CBA precluded vesting for a number of reasons. It emphasized "[f]irst and foremost" that the agreement lacked language promising vested benefits. *Id.* at 269. It also relied on the three-year durational clause. *Id.* at 269–70. Also relevant here, it rejected the retirees' argument that the "tying" of eligibility

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[7] The Sixth Circuit is divided on the precedential effect of *Tackett III*. *Compare Reese III*, App. 13 (relying on *Tackett III*, and suggesting that *Tackett III* "must govern" when in conflict with *Gallo*), *with Kelsey-Hayes*, slip op. at 6 (Griffin, J. dissenting from denial of rehearing) ("despite these overarching pronouncements, we did not substantively address the CBA at issue" in *Tackett III*); *and Kelsey-Hayes*, 854 F.3d at 873–74 (Gilman, J. dissenting) ("much of *Tackett III*'s language is therefore dicta because the discussion of contract principles was not necessary to the remand ruling.").

for retiree health benefits to eligibility for a pension suggested vesting, deeming that argument a "relic of a misdirected frame of reference" during the *Yard-Man* era. *Id.* at 272. Since the contract documents were unambiguous, the court declined to consider extrinsic evidence. And it pointed out that its decision "brings our court into alignment with other circuits around the country." *Id.* at 271.

Several months later, on the very same day it issued the decision at issue here, the Sixth Circuit decided *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017), *cert. pending*, No. 17-413 (docketed Sept. 19, 2017). *Cole* followed *Tackett* and deemed *Gallo* "materially indistinguishable from the facts before us" and reached the same conclusion that the benefits were not vested.[8] It reasoned that the retiree health benefits had no specific durational clause and therefore were subject to the general durational clause. *Id.* at 700. As in *Gallo*, the court declined to consider extrinsic evidence because "the language of the 2000 CBA is unambiguous." *Id.* at 701.

More recently, the Sixth Circuit decided *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206 (6th Cir. Sept. 1, 2017), applying the law of Michigan, which has embraced *Tackett*. *Id.* at *6. The court distinguished the decision here on the ground that "the CBA in *Reese III* carved out health insurance as a benefit that ended at a different time than other benefits, rendering the duration of that

---

[8] Because the *Tackett III* panel "did not resolve the merits of the case" before remanding it, the *Cole II* court correctly declined to follow the *Tackett III* panel's observations. *Cole*, 855 F.3d at 699.

benefit ambiguous." *Id.* at *7. These specific limits in *Reese III* were "coupled with evidence of tying" of health benefit eligibility to pension eligibility. *Id.* at *8. The court also noted that "evidence of tying cannot create an ambiguity where none would otherwise exist." *Id.* Accordingly, the court in *Serafino* enforced the general durational clauses and held the benefits not vested.

The same day it decided *Reese III* and *Cole*, on 20 April 2017, the Sixth Circuit decided *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), holding that the retirees' benefits *are* vested. Again, the court invoked the view in *Tackett III* that a general durational clause does not say "everything" about the intent to vest. *Id.* at 867. The court recognized that the benefits "were expressly subject to the CBA's duration clause," but ultimately determined that "[m]ultiple ambiguities plague our interpretation of the 1998 CBA." *Id.* at 867–68. In particular, the CBA barred "unilateral modification," and thus, according to the court, "the applicability of the general durational clause to the duration of health care benefits raises some ambiguities." *Id.* at 868. The court also found "latent ambiguities throughout the 1998 CBA itself." *Id.* at 869. Turning to "the mountain of extrinsic evidence," the court held the benefits vested. *Id.*

In short, as in this case, the aggressive and creative search for ambiguities in *Kelsey-Hayes* negated a clearly applicable durational clause, and conflicts with this Court's holding in *Tackett*. Thus, the rulings in this case and *Kelsey-Hayes* are in direct conflict with the Sixth Circuit's own decisions in

Gallo, *Cole*, and *Serafino*. To date, the Sixth Circuit has declined to consider any of the decisions en banc to resolve the conflicts between *Gallo*, *Cole*, and *Serafino*, on the one hand, and this case, *Tackett III*, and *Kelsey-Hayes*, on the other.

This confused state of play has led, predictably, to inconsistent results among the district courts within the Sixth Circuit. *Compare Sloan v. BorgWarner, Inc.*, No. 09-cv-10918, 2016 WL 7107228 (E.D. Mich. Dec. 5, 2016) (following *Tackett* and *Gallo* to reject vesting on summary judgment); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15-CV-2301, 2017 WL 3219728 (N.D. Ohio Jul. 28, 2017) (appeal pending No. 17-3885) (relying on *Gallo* to grant General Electric's motion to dismiss on the vesting issue); *and Watkins v. Honeywell Int'l, Inc.*, No. 3:16-CV-01925, 2016 WL 7325161, at *7 (N.D. Ohio Dec. 16, 2016) (relying on *Gallo* to hold contracts did not promise vested benefits and granting motion to dismiss complaint seeking such benefits), *with Zino v. Whirlpool Corp.*, No. 5:11-CV-1676, 2017 WL 3219830 (N.D. Ohio Jul. 27, 2017) (appeal pending No. 17-3851/3860) (distinguishing *Gallo* and relying on *Reese III* and *Kelsey-Hayes* to hold that "there are various ambiguities in the contracts" precluding reliance on the general duration clause, and denying motion to reconsider decision holding benefits vested); *Fletcher v. Honeywell Int'l, Inc.*, No. 3:16-cv-302, 2016 WL 6780020 (S.D. Ohio Nov. 15, 2016) (relying on *Tackett III* and distinguishing *Gallo* to deem contract ambiguous and deny motion to dismiss retirees' claim for vested health benefits); *and Fletcher v. Honeywell Int'l, Inc.*, 238 F. Supp. 3d 992, 994, 1008 (S.D. Ohio

2017) (appeal pending No. 17-3277) (after evidentiary hearing, and incorporating ruling on motion to dismiss, holding benefits vested).

The refusal of the Sixth Circuit to resolve the "mess" in its post-*Tackett* decisions leaves for this Court the task of returning the law to ordinary principles of contract law by granting review of this Petition.

III. THIS CASE SQUARELY PRESENTS BOTH THE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS ON A FULLY-DEVELOPED RECORD.

As shown, the decision below conflicts with long-standing precedent on vesting from other circuits as well as more recent precedent from other circuits interpreting *Tackett*. It also directly presents the existing intra-circuit conflict within the Sixth Circuit about the meaning of *Tackett*. By granting this petition, the Court can resolve a multitude of conflicts.

In addition, it can also provide certainty to retirees about the benefits to which they are contractually entitled, and provide critical guidance to employers about their obligations. It can circumvent a return to the forum shopping spawned in *Yard-Man*, which led the plaintiffs in this case to choose a foreign forum, where they had never worked and where CNH has never had any facilities, solely for the purpose of taking advantage of the more favorable law of vesting.

Moreover, after extensive discovery, four summary judgment decisions by the district court, three decisions by the Sixth Circuit, and two remand proceedings, the record in this case is complete and the issues well-posed. As the Sixth Circuit wrote in its second decision over five years ago, "[t]his long-running dispute needs to come to an end, and it is particularly unfair to prolong the dispute when the status quo [continuation of the benefits] not only favors just one party but also risks mooting the economic stakes of the case for the other party." *Reese II*, 694 F.3d at 685. That statement is even more true today.

CONCLUSION

For the reasons set forth above, CNH Industrial N.V. and CNH Industrial America LLC urge the Court to grant the petition for a writ of certiorari and schedule the case for briefing and argument.

Respectfully submitted,

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October 3, 2017

APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0092p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed April 20, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN, *Plaintiffs-Appellees*,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIAL AMERICA, LLC, *Defendants-Appellants.*	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:04-cv-70592—
Patrick J. Duggan, District Judge.

Argued: October 19, 2016

Decided and Filed: April 20, 2017

Before: GIBBONS, SUTTON, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Bobby R. Burchfield, KING & SPALDING LLP, Washington, D.C., for Appellants. Darcie R. Brault, MCKKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Appellees. **ON BRIEF:** Bobby R. Burchfield, KING & SPALDING LLP, Washington, D.C., for Appellants. Darcie R. Brault, MCKKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Appellees. Douglas A. Darch, BAKER & MCKENZIE LLP, Chicago, Illinois, for Amicus Curiae.

GIBBONS, J., delivered the opinion of the court in which DONALD, J., joined in the judgment. DONALD, J. (pg. 15), delivered a separate opinion concurring in the result. SUTTON, J. (pp. 16–24), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Defendants-appellants CNH Industrial N.V. and CNH Industrial America LLC (collectively "CNH") appeal the district court's order granting plaintiffs' motion for reconsideration. The trial court reversed its grant of summary judgment for CNH and instead granted summary judgment for plaintiffs. In this appeal, CNH again asks this court to find that plaintiffs' right to lifetime healthcare benefits failed to vest. If, however, we were to find that plaintiffs' right had vested, CNH

believes the district court erred in finding that CNH's proposed changes were not "reasonably commensurate" with plaintiffs' current plan.

This matter is complicated by a change in the law since this long-running litigation began. In light of *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), which abrogated this circuit's *Yard-Man* line of cases, the district court had to revisit the question of whether plaintiffs had a vested right to lifetime healthcare benefits. The court ultimately found that they did. Because we find that the CBA is ambiguous, and because the extrinsic evidence indicates that parties intended for the healthcare benefits to vest for life, we affirm the district court's vesting determination. Remand to the district court is proper, however, because it failed to properly weigh the costs and the *benefits* of the proposed plan, as instructed by *Reese II*.

I.

This case's long and complicated factual and procedural history has been recounted several times by this court and by the district court. Plaintiffs, former employees of CNH who retired between 1994 and 2004, filed suit in the Eastern District of Michigan in 2004, seeking a declaration that they were entitled to lifetime healthcare benefits, an injunction requiring CNH to "maintain the level of retiree health care benefits currently in effect," and damages for injuries the retirees might sustain if the benefits were terminated. *Reese v. CNH Am. LLC*, 574 F.3d 315, 319 (6th Cir. 2009) (*Reese I*). In 1971, CNH (then known as Case Corporation) and the United Automobile, Aerospace, and Agricultural Workers of America ("UAW") entered

into a collective-bargaining agreement ("CBA"), in which CNH agreed "to provide health-care insurance to its retired employees and their spouses who were receiving a [pension or a spouse's pension]" from the company. *Id.* at 318. "From 1974 through 1995, each CBA (in three- or four-year terms) renewed this commitment in 'substantially unchanged' form, and each CBA provided that employees did not have to pay premiums in order to receive coverage." *Id.* (internal citations omitted).

In 1998, CNH and UAW entered into the CBA that generated this lawsuit. *Id.* That CBA was in effect until May 2, 2004, and provided that:

> Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs.

Id. The paragraphs that followed listed the "Medical" and "Prescription Drug" benefits available to all classes of covered retirees regardless of the duration of their service before retirement. *Id.* "The CBA does not spell out what 'Medical' benefits are included; it just says that eligibility for specific coverage will be based on each plan's eligibility requirements, and goes on to note that no contributions . . . are required for the Health Care Plans . . . ." *Id.* (internal quotations and citations omitted.)

Ultimately, the district court and the *Reese I* court faced two questions: "Did [CNH] in the 1998 CBA agree

to provide health-care benefits to retirees and their spouses for life? And, if so, does the scope of this promise permit CNH to alter these benefits in the future?" *Reese v. CNH Am. LLC*, 694 F.3d 681, 683 (6th Cir. 2012) (*Reese II*). In *Reese I*, this court answered both questions in the affirmative, but remanded to the district court so that it could determine "how and in what circumstances CNH may alter [the healthcare benefits] . . . ." *Reese I*, 574 F.3d at 327. On remand, the district court failed to reach the reasonableness question and did not create a factual record upon which this court could rule. *Reese II*, 694 F.3d at 683. Instead, it found that CNH could not unilaterally make changes to the scope of plaintiffs' healthcare benefits, which was in conflict with our commands in *Reese I*. Thus, the case was remanded to the district court again, this time with a list of seven factors to consider when making its reasonableness-of-the-proposed-plan determination and with clear instructions that CNH could make unilateral changes to the plan.[1] *Reese II*, 694 F.3d at 685–86.

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[1] The seven factors are:

> [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
>
> [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
>
> [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
>
> [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan?

While on this second remand, another unexpected wrinkle was added to this case when the Supreme Court abrogated this circuit's *Yard-Man* decision and its progeny. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 930 (2015) (*Tackett*). Because *Yard-Man* created an inference in favor of employees in collective-bargaining cases, *Reese I*, 574 F.3d at 321, the district court was required to reconsider whether plaintiffs had a vested right to lifetime healthcare benefits. Initially, the district court found that they did not, noting that it was "[c]onstrained by the Supreme Court's decision" in *Tackett*. (DE 445, Op. & Order, Page ID 16912.) However, on plaintiffs' motion for reconsideration, the district reversed course and found not only that plaintiffs' rights were vested even after *Tackett*, but also that CNH's proposed changes were unreasonable. Thereafter, CNH filed this timely appeal.

II.

We review the district court's grant of summary judgment *de novo*. *Domingo v. Kowalski*, 810 F.3d 403,

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How fast are CNH's per-beneficiary costs likely to grow under each?
[5] What difference (if any) is there between the quality of care available under the old and new plans?

[6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?

[7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Reese v. CNH Am., LLC, 694 F.3d 681, 685–86 (6th Cir. 2012) (*Reese II*).

410 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 542 (6th Cir. 2014)). Construing the evidence in the light most favorable to the nonmovant, *id.* (citing *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013)), summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Before the Supreme Court decided *Tackett*, the rights created by collective-bargaining agreements were reviewed with a thumb on the scale in favor of employees. *Tackett*, 135 S. Ct. at 935. This doctrine, known most commonly as the *Yard-Man* inference, was the law in this circuit for more than thirty years. And it was the law in effect when this court and the district court initially reviewed the rights at issue in this case. In *Tackett*, the Supreme Court abrogated the *Yard-Man* inference and instructed courts to apply "ordinary principles of contract law" when reviewing collective-bargaining agreements. *Id.* at 937. Thus, the Supreme Court found, despite *Yard-Man* and its progeny's claim to the contrary, that we had not been employing ordinary contract-interpretation principles. What is hard to disentangle, however, is how many, if any, of the contract principles created by the *Yard-Man* line of cases survive *Tackett*. Presumably, not every contract-interpretation principle found in those cases impermissibly relied on inferences in favor of employees. But, *Tackett* required us to revisit those old rules to weed out impermissible assumptions and inferences.

On remand from the Supreme Court, we interpreted the high Court's instructions, and noted the following, non-exhaustive list of ordinary principles of contract law:

> • [A]s with any other contract, the parties' intentions control.
>
> • Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.
>
> • Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case.
>
> • [T]he written agreement is presumed to encompass the whole agreement of the parties.
>
> • Courts [should] avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract. . . . [A] promise that is "partly" illusory is by definition not illusory.
>
> • [C]ourts should not construe ambiguous writings to create lifetime promises. . . . [C]ontracts that are silent as to their duration will ordinarily be treated not as "operative in perpetuity" but as "operative for a reasonable time."

> • [T]raditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation.
>
> • Contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.
>
> • When a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

Tackett v. M & G Polymers USA, LLC, 811 F.3d 204, 208 (6th Cir. 2016) (*Tackett III*) (citing *Tackett*, 135 S. Ct. at 933–37). The *Tackett III* court went on to cite additional principles highlighted by Justice Ginsburg's concurrence:

> • Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.
>
> • [W]hen the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. . . . [F]or example, the parties' bargaining history.
>
> • No rule requires "clear and express" language in order to show that parties intended health-care benefits to vest.
>
> • Constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may be derived from the agreement's "explicit terms," but they may arise

> as well from implied terms of the expired agreement.

Id. at 208–09 (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)). "Importantly," *Tackett III* noted, "the Court rejected *Yard-Man*'s inferences in favor of retirees, but also declined to adopt an 'explicit language' requirement in favor of companies." *Id.* at 209 (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 203, 207 (1991) ("[A] collective-bargaining agreement [may] provide[ ] in explicit terms that certain benefits continue after the agreement's expiration," but nevertheless, "constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may arise as well from the express or implied terms of the expired agreement itself."). Thus, relying heavily on Justice Ginsburg's concurrence, *Tackett III* removed presumptions in favor of vesting, but also explicitly declined to shift that presumption to the employer.

The *Tackett III* court then proceeded to discuss what effect the absence of any durational language has on the vesting of rights. It held that:

> [W]hile the Supreme Court's decision [in *Tackett*] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

Tackett III, 811 F.3d at 209. The *Tackett III* court highlighted that the retirees in that case acknowledged that the agreements at issue lacked clear and express language vesting benefits, but still remanded the case to the district court so that it could determine whether certain documents were part of the agreements or "may otherwise serve as extrinsic evidence." *Id.* at 210 & n.3.

While, in some cases, the presence of a general-durational clause will cure any ambiguity as to the duration of benefits, *see Gallo v. Moen, Inc.*, 813 F.3d 265, 268 (6th Cir. 2016) (finding that, due to the lack of a specific end date, the CBA's healthcare benefits should be governed by agreement's general-durational clause), the general-durational clause here does not. This is so because the parties in this case carved out certain benefits, such as life insurance and healthcare insurance, and stated that those coverages ceased at a time different than other provisions of the CBA. True, this provision says only that healthcare coverage continues past the date of retirement and is silent on whether the benefits continue past the termination date of the agreement. But, when read in conjunction with the whole instrument, as *Tackett III* commands, this silence, rather than resolving ambiguity, furthers it. We cannot, and should not, presume that the general-durational clause here says everything about the parties' intentions. *Tackett III*, 811 F.3d at 209.

To find ambiguity in this case, partially from the silence as to the parties' intentions, does not offend the Supreme Court's mandate from *Tackett* that we not infer vesting from silence. There is surely a difference between finding ambiguity from silence and finding vesting from silence. The latter is impermissible after

Tackett; the former permits the court to turn to extrinsic evidence to determine the intent of the parties—precisely the goal in any contract dispute.

Further, just as the Supreme Court has commanded that we not infer vesting from silence, it has directed us not to infer vesting from the tying of benefits to achievement of pensioner status. But, as with silence, it has not directed us to ignore tying's ability to create ambiguity. Here, healthcare benefits were tied to pension eligibility. This, by itself, says little about whether those healthcare benefits should vest for life. It does, however, create an ambiguity about the parties' intentions. Inferring vesting from tying alone violates *Tackett* and ordinary principles of contract interpretation. Finding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended. This, as with silence, does not offend any principle of contract interpretation. Instead, it moves us closer to the ultimate goal in any contract dispute: discovering the parties' true intentions. *See Tackett III*, 811 F.3d at 208 (holding that the "cardinal principle of contract interpretation" should govern: what were the parties' intentions?) (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)).

Silence as to the duration of retiree healthcare benefits, when combined with those benefits' coupling to pensioner status and their segregation from other entitlements in the CBA, overcomes any presumption that the general-durational clause should govern. *See id.* (noting also our limitation on presuming that a general-durational clause, by itself, conclusively answers the question of vesting). If these elements

were not present, or if the CBA clearly stated that the general-durational clause was intended to govern healthcare benefits, the CBA would most likely be unambiguous. But this is not the case, and *Tackett III* prohibits us from relying exclusively on the general-durational clause to resolve this matter.[2] Here, presuming that the CBA's general-durational clause says everything about the parties' intentions ignores evidence, taken from the whole instrument, indicating that the parties may have intended the benefits to extend beyond the end of the CBA. Giving dispositive weight to the general-durational clause here would move the thumb from the employees' side of the scale and place it on the side of employers. *Tackett*, however, sought to create a level playing field, not to foster an equally inequitable one. Accordingly, we reach the extrinsic evidence in this case to determine the parties' intent.

The district court previously reviewed the extrinsic evidence and found that the plaintiffs' rights had vested. The record supports the district court's finding. For example, in an accounting document, CNH calculated the costs of certain retirees' benefits, and when determining healthcare costs, based the figure on

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[2] To the extent that *Tackett III* and *Gallo* are in conflict—a dispute about which reasonable minds may differ—*Tackett III*, being first in time, must govern. To so hold is not an endorsement of *Tackett III*'s reasoning nor is it an indictment of *Gallo*'s; rather, it simply demonstrates adherence to this court's precedent. *Darrah v. City of Oak Park*, 255 F.3d 301, 309–10 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also* 6th Cir. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.").

the employees' life span. It is unlikely that an employer would base the future cost of supplying an employee with healthcare insurance on the employee's life span, as CNH did here, if that employer knows that its healthcare obligations expire at a fixed date. Further, CNH representatives repeatedly told the company's employees that retirees would have healthcare coverage for their lifetimes. For example, in a June 18, 1990 letter to Reba Williams, the spouse of a deceased retiree, CNH informed her she would have medical insurance "coverage[] for [her] lifetime." (DE 153, Exh. 61.) And CNH intended to provide group insurance coverage to the spouses of retirees "in a consistent manner" to the way it handled Williams's claim. (DE 154, Exh. 62.) These and other examples in the record indicate that CNH, the retirees, and the retirees' spouses, intended and expected that the healthcare benefits provided were vested for life.

However, unless a CBA says otherwise, the vesting of healthcare rights does not prevent reasonable modifications to those rights. *Reese I*, 574 F.3d at 325. Thus, we must consider whether CNH's proposed changes are reasonable. In *Reese II*, we remanded this case to the district court so that it could consider, again, whether the proposed changes to plaintiffs' plans were reasonable. *Reese II*, 694 F.3d at 683. In so doing, we listed seven non-exhaustive factors that the district court should consider. *Id.* at 685–86. Those factors were:

> [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)?

> What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
>
> [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
>
> [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
>
> [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
>
> [5] What difference (if any) is there between the quality of care available under the old and new plans?
>
> [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
>
> [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. On remand, and after reconsidering whether plaintiffs' rights had vested, the district court proceeded to consider these factors. It grouped the first five together and stated that these factors all pertain to comparing the proposed plan to the current plan. The district court then considered the two remaining factors at the end of its analysis: a comparison of the proposed plan to the plans CNH offers current employees and

retirees and a comparison of CNH's proposed plan to other similar companies' plans.

The district court ultimately concluded that CNH's proposed plan was not reasonably commensurate with the current plan, relying primarily, if not exclusively, on the first five factors—specifically, the increased costs to plaintiffs under the proposed plan. The district court found that plaintiffs and current employees and retirees "are in roughly similar positions in terms of their healthcare situation," but yet found that this factor did not weigh strongly in favor of either party. It also found the final factor—the comparison between CNH's proposed plan and the plans offered by similar companies—did not weigh in favor of either party, and in its reasoning questioned the utility of this factor.

The district court's analysis erred in several ways, and remand is necessary to address these mistakes. *Reese II* made clear that the district court was to consider not only any increased costs to plaintiffs, but also any additional benefits that inured to them. *Reese II*, 694 F.3d at 685. Specifically, we asked the district court to determine if "the retirees' benefits differ in material respects from those offered to current employees and people retiring today," and whether the proposed changes to the plan "are reasonable in light of changes in health care (including access to new medical procedures and prescriptions)." *Id.* (internal quotations and citations omitted). Thus, while the district court held that the two plans provide roughly the same "quality of care" because both provide coverage for "medically necessary" procedures, this ignores that, before a procedure can be medically necessary, it must be medically possible. As we noted in *Reese II*, "[n]ew

and better medical procedures arise while others become obsolete. And it is the rare medical innovation that costs *less* than the one it replaces." *Reese II*, 694 F.3d at 683. Thus, "[r]etirees, quite understandably, do not want lifetime eligibility for the medical-insurance plan in place on the day of retirement, even if that means they would pay no premiums for it." *Id.* at 683–84. Instead, "[t]hey want eligibility for up-to-date medical-insurance plans, all with access to up-to-date medical procedures and drugs." *Id.* at 684. The district court's failure to consider the increased benefits, along with the increased costs, necessitates remand.

The district court focused heavily on cost-shifting provided for in the proposed plan. It did so with good reason: many of the *Reese II* factors dealt with changes in costs for CNH and for plaintiffs. In considering those changes in costs, however, the district court made several mistakes. For those Medicare-eligible plaintiffs, the district court considered only the costs shifted away from CNH, and apparently presumed that plaintiffs would foot this entire bill. Of course this is not true; a substantial portion of the costs shifted to Medicare-eligible plaintiffs will be covered by the federal government. Thus, the true cost-shifting is less than that highlighted by the district court.

The district court also erred by focusing too heavily on the future increased costs to non-Medicare-eligible plaintiffs. No plaintiff-retiree, and very few plaintiff-spouses, will be ineligible for Medicare in 2032. Thus, the most dramatic cost-shifting under the proposed plan is more paper tiger than realistic expectation. There are, however, thirteen plaintiffs—very young spouses of retirees—who would be ineligible for

Medicare in 2032. These unlucky thirteen would be subject to drastic increases in costs for their healthcare, and the district court refused to ignore them in its reasonableness analysis. Although it was right to acknowledge this small subset of the class, the district court placed an undue amount of weight on their costs. In any institutional setting, there will be certain members who are harmed by policy decisions. These thirteen spouses fall into that camp.

Because the proposed plan was materially similar to the plan offered to current employees and retirees, while being less expensive to plaintiffs, the district court further erred in finding that this factor did not favor either side. First, the mere fact that the proposed plan was equal in substance to the plan offered to current employees and retirees weighs in favor of reasonableness. *Reese II* asked the district court "[w]hat difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?" *Reese II*, 694 F.3d at 686. Thus, this reasonableness benchmark asked the district court to determine if the proposed plan was similar to the current plans being offered by CNH. The district court found that it was. Second, not only does the proposed plan place plaintiffs in substantially the same position in terms of healthcare benefits as current employees and retirees, but plaintiffs also pay less for these same benefits.

The district court was motivated to find this factor in equipoise by looking to benefits that post-2004 employees and retirees received outside the healthcare-benefit context. For example, while their premiums are higher than those under the proposed plan, current

employees and retirees also receive higher pensions and a one-time contribution to a health-savings account. Requiring consideration of these benefits, subsequently bargained for by UAW and CNH, would essentially grandfather all past-retirees into the new CBA from which they were explicitly excluded. Requiring an equal increase in plaintiffs' healthcare benefits for every benefit or concession won by current CNH employees is not part of the *Reese II* framework. The proposed plan must offer healthcare benefits similar to those received by current employees and retirees. It does not have to exceed this requirement to compensate plaintiffs for benefits to which they are not entitled. To do so would be not only unfair to CNH but also could have adverse consequences on future collective-bargaining agreements.

Finally, the district court erred in determining whether the proposed plan was reasonable in light of changes to healthcare. This factor asked the district court to review plans offered by "companies similar to CNH and with demographically similar employees." *Reese II*, 694 F.3d at 686. The district court discounted the utility of this factor, noting that "[n]aturally, the proposed plan will compare favorably to some plans and not to others, and the parties will surely locate the plans that support their respective litigation-induced positions and select those plans as comparators." (DE 450, Op. & Order, Page ID 17031.) Yet, even though it acknowledged the inherent biases of the parties' "cherry-picked" plans, the district court still used plaintiffs' comparator as the basis for its decision. (*Id.* at 17030, 17031.) It is true that the last factor is less than clear about what qualifies as a "similar company" or what exactly is meant by "demographically similar

employees," but this does not warrant ignoring as irrelevant the aggregate data of 900 companies. Many of these companies are large corporations (Ford, General Motors, AT&T, etc.) that are similar to CNH, and, while not perfect comparators, this aggregate data is worthy of consideration.

The district court also held that it could not consider the reasonableness of the proposed plan in piecemeal fashion. CNH challenges this holding and urges us to remand so that the district court can examine the proposed plan in this way. There is no law directly on point, and neither *Reese I* nor *Reese II* addresses this directly. There is language in both cases, however, that suggests that the court could permit the district court to sever the proposed plan and address each part individually. CNH claims *Reese I* supports its position that the terms of the proposed plan may be severed and examined individually. Specifically, it says that *Reese I*'s direction to the district court "to decide how and in what circumstances" CNH may alter such benefits suggests that the court may sever the terms. *See Reese I*, 574 F.3d at 327. Although not cited by CNH, language in *Reese II* also suggests that the terms may be severed. There, the court held that the reasonableness inquiry here "is a vexing one" and that "if the parties cannot resolve the [issues] on their own, we (and the district court) will do our best to resolve it for them." *Reese II*, 694 F.3d at 686. Thus, we see no reason why the district court cannot examine individual terms of the proposed plan for reasonableness. And, allowing the district court to determine which terms are reasonable, and which are not, might facilitate the settlement process between the

parties and could lead to a quicker resolution of this long-running litigation.

On remand, the district court should reconsider the factors presented in *Reese II*, with special attention on the increased benefits to plaintiffs—including those benefits created by progress in medical procedures and prescriptions. The district court should also consider how much of the cost to Medicare-eligible retirees will be borne by the federal government or others. And lastly, the district court should reconsider whether the proposed plan is reasonable in light of the plans offered at similar companies—*i.e.*, large manufacturing corporations with union representation.[3] It should also look to the individual terms proposed and determine, if not reasonable on the whole, whether individual pieces of the plan are reasonable.

IV.

For the reasons stated above, we affirm the district court's finding that plaintiffs' right to lifetime healthcare benefits vested. Remand is necessary, however, so that the district court can reconsider the reasonableness of CNH's proposed plan in light of *Reese I*, *II*, and the instructions they provide.

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[3] The "demographically similar employees" language from this *Reese II* factor must do some work, and we believe comparing collectively-bargained-for agreements to collectively-bargained-for agreements, coupled with limiting the inquiry to large manufacturing corporations, will help ensure that the comparators are similar to CNH.

CONCURRENCE

BERNICE BOUIE DONALD, concurring. I agree with the lead opinion as to affirming the district court's vesting determination and, so, concur in the judgment. I write separately, however, to reassert my disagreement with this Court's previous determination that despite a lifetime vesting, CNH may unilaterally modify the scope of the retirees' healthcare benefits.

In *Reese I*, the Court held that "to the extent [the district court] suggests that these benefits must be maintained precisely at the level provided for in the 1998 CBA, it is not supported by the 1998 CBA, extrinsic evidence provided by the parties or common sense." *Reese I*, 574 F.3d at 327. The converse, that CNH may "reasonably" alter these benefits, however, is not supported by this Court or Supreme Court precedent. As I noted in my dissent in *Reese II*, "[s]everal decisions of this Court, as well as Supreme Court precedent, express the principle that, once a retiree's health care benefits have vested for life, an employer's unilateral modification of the scope of those benefits is a violation of the Labor Management Relations Act." *Reese II*, 694 F.3d at 687 (citing *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 187, 181 n.20 (1971); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006)). My review of this issue and the relevant law, unchanged by the Supreme Court's decision in *Tackett*, causes me to continue in my belief that because we have found that the retirees' healthcare benefits vested for life, "the

level of those benefits must be deemed vested in scope and *not* subject to unilateral modification by CNH." *Reese II*, 694 F.3d at 688.

Considering, however, the well-established law-of-the-case doctrine, *see Caldwell v. City of Louisville*, 200 F. App'x 430, 432–33 (6th Cir. 2006) ("The law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case"), I recognize the limitations—although not the impossibility—in reaching a result that is inconsistent with that reached at this Court's first review of this case.

DISSENT

SUTTON, Circuit Judge, dissenting. In a 9–0 decision reversing our court in *M & G Polymers USA, LLC v. Tackett*, the Supreme Court asked us to do two things: (1) to interpret collective bargaining agreements "according to ordinary principles of contract law," and (2) to stop using the extraordinary *Yard-Man* "inferences," which had "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." 135 S. Ct. 926, 933, 935 (2015). With the unanimous overruling of *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), those twin directives became one: apply normal rules of contract interpretation to promises with respect to healthcare benefits.

Because our court had long insisted that the *Yard-Man* inferences sprang from ordinary contract law, the Supreme Court proceeded to guide us about what counts as an ordinary contract principle and what does not. The Court told us to respect "general durational clauses" in collective bargaining agreements, reminded us that "courts should not construe ambiguous writings to create lifetime promises," and directed us that, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* at 936–37.

These principles should make quick work of this case. In this collective bargaining agreement, the company never promised to provide healthcare benefits for life, and the agreement contained a durational

clause that limited *all* of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement. In every other circuit in the country, that would end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would.

Not here. The court concludes that the company made a lifetime commitment to provide healthcare benefits as a matter of law. Is this the application of "ordinary principles of contract law"? I am dubious. I know of no other area of contract law in which an agreement's promises, subject to an uncontradicted durational clause, could be found ambiguous as to their duration—and then interpreted to last for life. The court's approach to this contract is ordinary only in this circuit and only in ways that contradict the Supreme Court's unambiguous directives about how to interpret such contracts. I respectfully dissent.

Several ordinary contract principles tell us how to resolve this case. One says that the four corners of the collective bargaining agreement are a good place to start. "Because 'the written agreement is presumed to encompass the whole agreement of the parties,' and because Congress has placed special emphasis on the 'written terms' of retiree healthcare plans, we must enforce those terms as written." *Gallo v. Moen Inc.*, 813 F.3d 265, 270 (6th Cir. 2016) (quoting *Tackett*, 135 U.S. at 936, 933), *cert. denied*, 137 S. Ct. 375 (2016); *see also* 29 U.S.C. § 1102(a)(1). In this instance, the key is what the agreement does and does not say. It *never* promises lifetime healthcare benefits. What *is* written are two things: a specific promise of retiree healthcare benefits

and a general durational clause that ends the entire agreement on "May 2, 2004." That means the benefit lasts as long as the commitment—until May 2, 2004.

Reinforcing that conclusion is another traditional principle. "[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991); *see Tackett*, 135 S. Ct. at 937. This agreement does not contain any written terms saying that healthcare benefits are excepted from the durational clause. Just the opposite: The agreement says that the Group Benefit Plan "*will run concurrently* with this Agreement and is hereby made a part of this Agreement." R. 439-4 at 45 (emphasis added). The durational clause, and the absence of any provision setting a time frame for healthcare benefits, is all anyone needs to know to decide this case. The benefits do not last beyond May 2, 2004, because the agreement did not promise them beyond that date. Any other approach to the issue, *Tackett* explained, "distort[s] the text" of the agreement by "refus[ing] to apply general durational clauses to provisions governing retiree benefits." 135 S. Ct. at 936.

A third principle cements this conclusion. "[W]hen a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* at 937. In this case, the healthcare-benefits promise is silent as to the length of the commitment, and the agreement contains an expiration date of six years. That means the promise ends on May 2, 2004, unless and until the parties agree to extend it in the next collectively bargained agreement (just as they had so often done in the past).

Last but not least is this: Even if there were no durational language, even in other words if there were no six-year limit to the agreement, we still could not construe this agreement's commitments as lifetime promises. "[T]he traditional principle," *Tackett* noted, is "that courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936. "[C]ontracts that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time.'" *Id.* (quoting 3 A. Corbin, *Corbin on Contracts* § 553, p. 216 (1960)).

These principles should resolve this case. And they would resolve this case in every other circuit in the country. Before *Tackett*, ours was the only circuit that applied a presumption in favor of treating healthcare benefits as promises for life. *See Noe v. PolyOne Corp.*, 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part). The other circuits applied the just-mentioned rules of interpretation to contracts just like this one, confirming that these rules are indeed "ordinary," and thus respected the durational clauses in each of them. *See, e.g.*, *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000); *see also* Raymond A. Franklin, Note, *Vesting Retirement Benefits: Revisiting* Yard-Man *and Its Unacknowledged Presumption*, 25 J. Civ. Rts. & Econ. Dev. 803, 821–22 (2011). After *Tackett*, unsurprisingly, the other courts of appeals continue to enforce general durational clauses in similar agreements—including a unanimous Fourth Circuit decision from just a few weeks ago. *See*

Barton v. Constellium Rolled Prods.-Ravenswood, LLC, 851 F.3d 349, 354 (4th Cir. 2017); *see also Finley Hosp. v. NLRB*, 827 F.3d 720, 725 (8th Cir. 2016); *Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund*, 800 F.3d 411, 421 (7th Cir. 2015).

There is one area, it's worth pointing out, in which *our circuit* has followed these traditional rules. Pre-*Tackett* and post-*Tackett*, we have honored these principles if the healthcare-benefits promise was contained in an employment agreement between an individual and the company, as opposed to a collectively bargained agreement. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc). That means we have applied a presumption in favor of lifetime vesting where it is needed least (company promises in which the employees were collectively represented by a union), not where it is needed most (company promises in which the employees have no representative). Notably, *Tackett* favorably cited Judge Nelson's decision in *Sprague*, suggesting we should apply the *same rules* in both settings. *Tackett*, 135 S. Ct. at 936–37.

I am hard pressed to understand our hesitance in following the path that the Supreme Court has set for us, that the other circuits have long followed, and that we have followed when it comes to non-collectively bargained agreements with respect to the *same* subject matter. In what area of contract law would we disregard a durational clause? I know of none. How, then, can this be the application of ordinary contract principles? I know not.

In abrading an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut,

the court with respect makes too much of the silence in the healthcare-benefits provision about the length of the commitment and too little of the durational clause's express limitation of these benefits to "May 2, 2004." Contractual ambiguity, it may be true, gives courts a warrant to search the record for extrinsic evidence of contractual meaning. But that warrant requires a textual finding unfound here—that there are two competing interpretations, both of which are fairly plausible readings of the language. *See TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 582–83 (6th Cir. 2010); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 425 (2012). Put differently, if there is only one fair reading of the agreement, that is the end of the matter.

So it should end here. Everyone agrees on one fair reading: that retiree healthcare benefits would last, like the rest of the promises in the agreement, until the contract expired on May 2, 2004. The majority offers another: that the contract promised retiree benefits for life. But the contract principles that the Court spelled out in *Tackett* do not permit that reading.

Consider the court's efforts to identify ambiguity and to resolve it in favor of a lifetime promise. It points to a provision in the Group Benefit Plan that says pension-eligible retirees "who retire . . . after 7/1/94" and their spouses "shall be eligible for the Group benefits as described in the following paragraphs [which include medical coverage]. All other coverages cease coincident with the date of employment termination due to retirement." R. 439-3 at 28. But this provision says only that healthcare coverage continues past the date of *retirement*. It does not say that benefits

continue past the termination date of the agreement, much less that they continue for life.

Silence about the length of this commitment, the court adds, supports a finding of ambiguity. In the court's words: "when read in conjunction with the whole instrument, . . . this silence, rather than resolving ambiguity, furthers it." Maj. Op. 7. But that is true only if we ignore what "the whole instrument" says. When read in conjunction with a durational clause that expressly limits all provisions of the agreement to six years, silence as to a benefits provision must submit to the durational clause, not override it.

Nor does this interpretation require us to "presume that [the] general durational clause says *everything* about the intent to vest." *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204, 209 (6th Cir. 2016); *see* Maj. Op. 8. That is a straw man. The durational clause sets an end date, hardly a surprise in a collective bargaining agreement, and that end date applies when nothing in the agreement contradicts it. No presumptions necessary. And no ambiguity. Silence on the duration of the retiree healthcare benefits means that the agreement's general durational clause is still the only provision specifying when those commitments terminate—May 2, 2004. *See Gallo*, 813 F.3d at 269–70. Any other approach is *Yard-Man* re-born, re-built, and re-purposed for new adventures.

The court is troubled that "[g]iving dispositive weight to the general-durational clause here would move the thumb from the employees' side of the scale and place it on the side of employers" and that "*Tackett* sought to create a level playing field, not to foster an

equally inequitable one." Maj. Op. 8–9. No worries there. As just shown, there is no risk in giving "dispositive weight" to an express general durational clause so long as courts honor express limits or extensions of promises in the agreement. More fundamentally, *Tackett* did not direct courts to give employees and employers an equal shot in litigation regardless of what their contract said; it ensured that collective bargaining agreements would be interpreted by the same, ordinary principles as other contracts. Equality between contracts, not between litigants faced with different contractual commitments. In any other area, we would say an uncontradicted general durational clause controls all of the promises in an agreement. If that puts a thumb on any side of the scale, it's because the text of the collectively bargained agreement put it there. And silence cannot lift it.

How, one might ask, does the court sidestep the Supreme Court's command that, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life"? *Tackett*, 135 S. Ct. at 937. Isn't that rule applicable here? Don't the court's repeated references to "silence" about the duration of the healthcare-benefits commitment implicate the rule? The majority demurs "because the parties in this case carved out certain benefits, such as life insurance and healthcare insurance, and stated that those coverages ceased at a time different than other provisions of the CBA." Maj. Op. 7. But that is a recycling of the point addressed above—that the agreement says that retiree healthcare benefits continue after the date of retirement, quite understandably, but not after the expiration date of the agreement. All the court has to go on to extend the

benefits past the end of the agreement, once again, is: silence. And under *Tackett*, we cannot infer vesting from silence.

The court next claims ambiguity about whether the healthcare benefits last a lifetime because eligibility for healthcare benefits is linked to pensions and because pensions are vested lifetime commitments. But the tying language in this contract has nothing to do with the duration of the healthcare benefits. The agreement says that pensioners "shall be eligible" for healthcare benefits *for as long as the agreement provides those benefits*—that is, until May 2, 2004—not for as long as retirees earn a pension. The court admits that the tying of healthcare benefits to pensioner status "by itself, says little about whether those healthcare benefits should vest for life. It does, however, create an ambiguity about the parties' intentions." Maj. Op. 8.

But if tying says little about vesting, how does it create ambiguity about vesting? I do not know. *Tackett* at any rate "rejected this kind of 'tying' analysis as a relic of a misdirected frame of reference, calling it one of many *Yard-Man* inferences that was 'inconsistent with ordinary principles of contract law.'" *Gallo*, 813 F.3d at 272 (quoting *Tackett*, 135 S. Ct. at 937). A forbidden inference cannot generate a plausible reading. And without a plausible explanation for treating the healthcare benefits promise as a promise for life, the general durational clause controls. We do not "expect to find lifetime commitments in time-limited agreements." *Gallo*, 813 F.3d at 269. To suppose that this agreement's tying language suggests lifetime vesting clearly enough to override an explicit durational clause is to find an elephant-sized

commitment in a linguistic mousehole. *See id.*; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It doesn't fit, and it doesn't belong.

Because the retiree healthcare benefits expired on May 2, 2004, the extrinsic evidence invoked by the court is neither here nor there. Still, even setting aside the absence of a contractual ambiguity to resolve—even indeed setting aside the agreement's provision *precluding* use of parol evidence, R. 439-4 at 47—the extrinsic evidence does not support the court's position. Start with the parties' bargaining history. "The 1998 CBA not only set the rules for employees who retired during the next six years of that CBA; it also *reset* the rules for employees who retired after July 1, 1994, which is inconsistent with the notion that the 1990 and 1995 CBAs (using the same [retiree healthcare benefit] language as the 1998 CBA) created unalterable, irreducible health benefits." *Reese v. CNH Am. LLC*, 574 F.3d 315, 324 (6th Cir. 2009). After *Tackett*, that same logic shows a lack of vesting, which is exactly what we concluded in *Gallo*. That these benefits were reset (or "continued" as in *Gallo*) after prior agreements expired undermines a theory of vesting because it indicates that they would have to be reset again when this agreement expired. *See Gallo*, 813 F.3d at 270.

This bargaining history also casts a clarifying light on the accounting document that shows CNH planned to pay healthcare benefits for the life of the retiree. CNH and the union renewed retiree healthcare benefits in each successive agreement until this litigation began. All that the accounting document shows is that CNH expected that practice to continue

and forecast its budget accordingly. We dealt with exactly this situation in *Gallo*: "That a company to its credit hopes to subsidize healthcare benefits for its retirees for as long as possible does not mean it has promised to do so." 813 F.3d at 274. Taken in context, the accounting document shows only that CNH hoped and planned to pay lifetime healthcare benefits, not that it was contractually bound to do so. *See Witmer v. Acument Glob. Techs., Inc.*, 694 F.3d 774, 777 (6th Cir. 2012).

Nor is the remaining extrinsic evidence helpful, as most of it predates the relevant time period. The plaintiffs consist of retirees from between July 1, 1994 and April 1, 2005, and this dispute concerns what the company promised to that group. No amount of parol evidence regarding prior agreements, including promises made to workers who retired in the 1970s and '80s, is probative of the meaning of a set of distinct promises made by a new corporate parent for the first time in 1995, and then in altered form in 1998. The 1993 and 1995 "cap letters" showed that CNH planned to provide coverage beyond the term of the 1995 agreement, but again a commendable and hope-filled plan does not entail a binding commitment. We should reject this argument for the same reason the Fourth Circuit just rejected it: "The Cap Letters both fall far short of *Tackett*'s requirement for a clear signal that parties intend for benefits to vest and fail to negate the unambiguous durational language in [the agreement]." *Barton*, 851 F.3d at 356. The "Letter[s] of Understanding" that accompanied the 1998 agreement, moreover, reinforce the conclusion that the benefits were not vested. One letter provided that CNH could unilaterally alter benefits to reflect new healthcare

laws, and the other limited its promise to keep retiree costs constant to "the term of the 1998 labor agreement," R. 439-3 at 42. Even if admissible, the documents do not establish a lifetime right to healthcare benefits.

* * *

The conundrum of today's decision is that *Tackett* tells us to apply ordinary contract principles to these agreements, and yet every other court in the country would handle this case differently. I could double the length of this opinion with applicable quotes from other circuits but will offer just a few to make the point. Here's one circuit: "[E]ntitlements established by collective bargaining agreements do not survive their expiration or modification. . . . The mere silence of Collective Bargaining Agreements and plan documents concerning the vestment of welfare benefits fails to give rise to an ambiguity." *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 816 (7th Cir. 1992) (quotation omitted). And another: "Contractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation [of the right to alter health coverage]." *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). And another: "Promising to provide benefits for a certain period of time necessarily establishes that once that time period expires, the promise does as well. . . . Therefore, we conclude that this provision unambiguously establishes that once the CBAs expired, Multifoods was free to reduce retiree medical benefits." *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997). And another: "The most natural reading of a contract that

has defined endpoints of 1998 and 2001 is that terms in the contract apply to events between 1998 and 2001." *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767, 770 (8th Cir. 2004). And still another: "Silence on duration . . . may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *UAW v. Skinner Engine Co.*, 188 F.3d 130, 147 (3d Cir. 1999). And yet another: "The plain language of the CBA and SPD clearly indicates that the retiree health benefits did *not* vest [because the general durational clause] contains explicit durational language stating that the retiree health benefits continue 'for the term of' the governing CBA." *Barton*, 851 F.3d at 354.

Either our circuit or the rest of the country is not applying "ordinary principles of contract law" to these agreements. *Tackett*, 135 S. Ct. at 937. I fear that we, again, are out of step.

A last point, about the equities. No one likes the thought of ending healthcare benefits for retirees who have worked for much of their lives and who may not be able to take on new jobs now. But it is by no means clear that this is what would happen if we followed *Tackett* and ruled that the benefits did not vest. The absence of a contractual right to lifetime healthcare does not mean that these retirees will not receive healthcare benefits. Even aside from existing federal healthcare programs, there's no reason to think that the incentives that drove the company and the union to agree repeatedly on retiree healthcare benefits in the past will cease to drive the parties to make similar arrangements in the future. During oral argument, CNH confirmed that it intended, if it prevailed on the

vesting issue, to bring this class of retirees into a healthcare plan *that mirrors the one offered to current employees and more recent retirees*. At stake, then, is the plaintiffs' desire for *better* healthcare benefits than current employees and recent retirees. Whether that request is fair or not, equitable or not, it isn't what this collective bargaining agreement provides.

For these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed April 20, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN, Plaintiffs - Appellees,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIAL AMERICA, LLC, Defendants - Appellants.	)

Before: GIBBONS, SUTTON, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's vesting determination is AFFIRMED. IT IS FURTHER ORDERED that the case is REMANDED to the district court with instructions to properly weigh the costs and the benefits of the proposed plan in accordance with *Reese II*.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 04-70592
Honorable Patrick J. Duggan

[Filed November 9, 2015]

JACK REESE, JAMES CICHANOFSKY, ROGER MILLER, and GEORGE NOWLIN, on behalf of themselves and a similarly situated class

Plaintiffs,

v.

CNH INDUSTRIAL N.V. and CNH INDUSTRIAL AMERICA, LLC,

Defendants.

OPINION AND ORDER (1) GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION [ECF NO. 447]; (2) VACATING THE COURT'S SEPTEMBER 28, 2015 JUDGMENT [ECF NO. 446]; (3) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [ECF NO. 423]; (4) GRANTING

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF NO. 419]; AND DENYING AS MOOT PLAINTIFFS' MOTION TO STRIKE [ECF NO. 428]

On September 28, 2015, this Court issued a decision holding that the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), required the reversal of this Court's previous holding– affirmed by the Sixth Circuit Court of Appeals– that Plaintiffs are entitled to lifetime vested retiree health care benefits. *Reese v. CNH Industrial N.V.*, No. 04-70592, 2015 WL 5679827 (E.D. Mich. Sept. 28, 2015). The Court therefore entered a Judgment on the same date, ruling in favor of Defendants and against Plaintiffs. (ECF No. 446.) Plaintiffs filed a motion for reconsideration pursuant to Eastern District of Michigan Local Rule 7.1 on October 13, 2015. (ECF No. 447.) At this Court's invitation, Defendants (hereinafter "CNH") filed a response to Plaintiffs' motion. (ECF No. 449.) The Court concludes that it in fact committed a palpable error in its September 28, 2015 decision, the correction of which results in a different disposition of the case. *See* E.D. Mich. LR 7.1(h)(3). As such, the Court is vacating the Judgment entered on the same date and proceeding to rule on the motions it found moot as a result of holding that Plaintiffs' retiree health insurance benefits did not vest.

I. Plaintiffs' Motion for Reconsideration

The Court's palpable error can be summarized as follows. In its most recent motion for summary judgment on the issue of vesting, CNH correctly asserted that this Court and the Sixth Circuit

previously relied on inferences repudiated in *Tackett* when concluding that Plaintiffs are entitled to vested retiree health care benefits. CNH incorrectly asserted, however, that the only conclusion to be reached once those inferences are removed is that the parties intended Plaintiffs' retiree health insurance benefits to terminate with the 1998 Central Agreement. According to CNH, the Supreme Court in *Tackett* set forth "*new* rules of construction that now govern, in all circuits, the determination of whether retiree health benefits are vested." (ECF No. 439 at Pg ID 11606, emphasis added.) In fact, *Tackett* did not create new rules for construing collective bargaining agreements. Instead, the Supreme Court in *Tackett* simply rejected the inferences set forth in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), and its progeny, and reaffirmed that collective bargaining agreements are interpreted "according to ordinary principles of contract law . . .." *Tackett*, 135 S. Ct at 933. CNH failed to apply those ordinary principles of contract law to the relevant agreements in its motion for summary judgment– a mistake this Court repeated in reaching its September 28, 2015 decision. Now applying those principles, this Court concludes that Plaintiffs are entitled to vested retiree health insurance benefits.

As the Supreme Court re-emphasized in *Tackett*, a court's objective when interpreting any contract, including a collective bargaining agreement, is to "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Tackett*, 135 S. Ct. at 933 (quoting *Stolt-Nielsen*, 559 U.S. at 682) (" 'In this endeavor, as with any other contract, the parties' intentions control.' "). " 'Where the words of a contract

in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.' " *Tackett*, 559 U.S. at 682 (quoting 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012)). The Court is confident that it may rely on Justice Ruth Bader Ginsburg's elaboration of "ordinary contract principles" in her concurrence in *Tackett* (despite CNH's warning otherwise), particularly as Justice Ginsburg relies on the same treatise used by the majority as the source of these principles:

> Under the "cardinal principle" of contract interpretation, "the intention of the parties, to be gathered from the whole instrument, must prevail." 11 R. Lord, Williston on Contracts § 30:2, p. 27 (4th ed. 2012) (Williston). To determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific "customs, practices, usages, and terminology." *Id.*, § 30:4, at 55-58. When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further. *Id.*, § 30:6, at 98-104. But when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. *Id.*, § 30:7, at 116-124.

135 S. Ct. at 937-38 (Ginsburg, J., concurring); *see also Brooklyn Life Ins. Co of New York v. Dutcher*, 95 U.S. 269, 273 (1877) ("There is no surer way to find out what parties meant than to see what they have done.").

Contrary to CNH's contention in its summary judgment motion, the absence of clear and express

language vesting Plaintiffs' health insurance benefits in the relevant agreements does not necessarily compel the conclusion that the parties lacked the intent for those benefits to vest. Imposing such a requirement on collective bargaining agreements in general, or ERISA welfare benefits in particular, strays from the ordinary contract principles that *Tackett* instructs courts to apply in construing those agreement. As the Supreme Court has previously stated, duties in a contract may arise from its express or *implied* terms. *See Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 203 (1991).

CNH overstates the significance of the *Tackett* Court's single reference to *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). The Court refers to the standard applied in *Sprague* only to "underscore[] *Yard-Man*'s deviation from ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937. It is important to remember, as well, that *Sprague* did not involve bargained-for benefits; instead, the benefits at issue in that case were specifically characterized as unilaterally offered benefits. *Sprague*, 133 F.3d at 393, 402-03. Perhaps more importantly, if the *Tackett* Court intended to require clear and express vesting language to find the parties' intent to vest, why would it have not simply held that the Pension, Insurance, and Service Award Agreement at issue in the case before it- which lacked such express language- did not confer vested benefits? Instead, the Supreme Court remanded the case to the court of appeals. *Tackett*, 135 S. Ct. at 937.

This Court indicated in its September 28, 2015 decision that it "did not find a manifestation of intent to confer lifetime benefits in this case." *Reese*, 2015 WL

5679827, at *10. After tossing aside the *Yard-Man* inferences employed earlier by this Court and the Sixth Circuit in this case and in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd* 435 F.3d 571 (6th Cir. 2006), this Court then concluded "that its prior determination that the parties intended to confer lifetime healthcare benefits is no longer viable in light of the Supreme Court's intervening decision in *Tackett*." *Reese*, 2015 WL 5679827, at *10. The Court committed a palpable error by being too haste in reaching this conclusion. For the lack of a clear manifestation of the parties' intent in the collective bargaining agreement did not negate the possibility that there was ambiguity regarding their intent. Yet, the Court neglected to consider this possibility.[1] And as Plaintiffs argue in their motion for reconsideration, if the contract is ambiguous, the Court should have considered the "substantial extrinsic evidence . . . demonstrat[ing] that the UAW and Case intended to provide retirees and surviving spouses fully funded, lifetime health insurance benefits."[2] (ECF No.

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[1] *Tackett* does advise "that courts should not construe ambiguous writings to create lifetime promises." 135 S. Ct. at 936 (citation omitted). This Court erred in taking this direction to the opposite extreme: construing an ambiguous writing to create no lifetime promise. As long-standing principles of contract interpretation instruct, where a contract is ambiguous, extrinsic evidence may resolve that ambiguity.

[2] CNH's motion for summary judgment on the issue of vesting did not go further than arguing that once the inferences established in *Yard-Man* and its progeny are set aside, the Court must conclude that the parties did not intend Plaintiffs' health insurance benefits to vest. Because, in fact, the Court's inquiry should not end there, the Court could find that CNH has not established its entitlement

447, quoting *Yolton*, 318 F. Supp. 2d at 468); *see also Yolton*, 435 F.3d at 583. There are several reasons why this Court now finds an ambiguity in the relevant agreements.

As an initial matter, the Court erred in reading *Tackett* as "suggest[ing] that courts should not rely on language tying eligibility for contribution-free healthcare benefits to the receipt of pension benefits." *See Reese*, 2015 WL 5679827, at *9. All that *Tackett* holds or suggests is that a court may not *infer* from such tying language that the parties intended retiree health insurance benefits to vest. Such language does not lose all significance, however. In other words, *Tackett* does not hold that courts must ignore language that under *Yard-Man* and its progeny inferred an intent to vest. To the contrary, *Tackett* advises courts to apply "ordinary principles of contract law[,]" 135 S. Ct. at 933; and under those principles, " 'the intention of the parties' " is "gathered from the *whole instrument* . . .." *Id.* at 937 (Ginsburg, J., concurring) (emphasis added).

When the relevant agreements were negotiated, the parties were aware that pension benefits vest for the life of the retiree. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983) (citing 29 U.S.C. §§ 1051-1086) (explaining that ERISA "imposes participation, funding, and vesting requirements on pension plans). By tying eligibility for retiree health insurance benefits to eligibility for pension benefits, the parties may have

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to summary judgment based on its argument that *Tackett* requires a reversal of the prior conclusion that Plaintiffs are entitled to vested retiree health insurance benefits.

been expressing their intent for health insurance benefits to survive for the same duration. In other words, so long as an individual is eligible to receive a pension benefit, he or she continues to be eligible for the retiree health insurance benefits promised in the agreements.

Similarly, the absence of contract language specifically setting forth the duration of retiree health insurance benefits does not dictate automatically that the agreement's general durational clause applies to those benefits. Without doubt, the *Tackett* Court criticized the Sixth Circuit's expansion of *Yard-Man* in *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008), where the Sixth Circuit concluded that " '[a]bsent specific durational language referring to retiree benefits themselves,' a general durational clause *says nothing* about the vesting of retiree benefits." *Tackett*, 135 S. Ct. at 934 (quoting *Noe*, 520 F.2d at 555) (emphasis added in *Tackett*). Nevertheless, the *Tackett* Court did not hold that in the absence of specific durational language a general durational clause *says everything* about the vesting of retiree benefits. If this had been the meaning of the Court's holding– where the contract at issue lacked a specific durational clause for retiree health insurance benefits– why remand the case to the Sixth Circuit with instructions to apply ordinary rules of contract law to determine whether the parties intended those benefits to survive the contract's expiration? *Tackett*, 135 S. Ct. at 937.

It is true that generally " 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* (quoting *Litton*, 501 U.S. at 207). It is equally true, however, that the

expiration of a contract does not release the parties from obligations that are fixed under the contract, but have not been satisfied. *Litton*, 501 U.S. at 206 (explaining that "an expired contract has by its own terms released all its parties from their respective contractual obligations, *except* obligations already fixed under the contract but as yet unsatisfied.") (emphasis added).

Whether the parties intended certain obligations to survive the agreement's expiration is, again, determined by looking at the contract as a whole. Notably, here, the 1998 Central Agreement states that the group insurance plan *and the pension plan* "run concurrently with this Agreement . . .." (ECF No. 439-4 at Pg ID 16755.) Yet no one contends that the company's obligation to provide pension benefits ceased upon the expiration of the agreement. Further, under the heading "Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension", the 1998 Group Insurance Plan provides:

> Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs. *All other coverages cease coincident with the date of employment termination due to retirements* . . ..

(ECF No. 439-3 at Pg ID 16688, emphasis added.) Among the benefits "described in the following paragraphs" are group health insurance benefits for

retirees, for which "[n]o contributions are required[.]" (*Id.* at Pg ID 16688-16690.) At the very least, these provisions create an ambiguity with respect to the parties' intent. The inclusion of specific durational clauses for other benefits but not pension plan and retiree health insurance benefits further raises an ambiguity with respect to the parties' intent as to the duration of the latter benefit.

Other agreements between the parties further support a finding that the parties intended retiree health insurance benefits to vest. For example, in the Group Benefit Plan made effective with the 2005 negotiations between the parties and developed through the 2005 Central Agreement, retirees and surviving spouses of retirees *who retired on or after December 1, 2004*, were required to contribute towards their medical plans per a contribution schedule. (*See* ECF No. 125-18 at Pg ID 4530, 4557.) If the parties did not intend for retiree health care benefits to vest in the agreements preceding the 2005 agreement (i.e., if they intended for coverage to expire with the prior agreements), why limit contributions to post-December 1, 2004 retirees? The agreements this Court has referred to as "the 1993 Cap Letter", "the 1995 Cap Letter", and "the 1998 Letter of Understanding" offer further proof. (*See* ECF No. 125-6 at Pg ID 4438; ECF No. 125-8 at Pg ID 4650; ECF No. 125-11 at Pg ID 4306.) As this Court has previously found, these agreements reflect the parties' intent to vest retiree health care benefits which were provided in the 1998 collective bargaining agreement and preceding agreements. *See Reese v. CNH Global N.V.*, No. 04-70592, 2007 WL 2484989, at *7-9 (E.D. Mich. Aug. 29, 2007).

In short, as a result of the Supreme Court's decision in *Tackett*, courts may no longer rely on the inferences set forth in *Yard-Man* and its progeny when evaluating collective bargaining agreement to discern the intent of the parties with respect to the vesting of retiree health insurance benefits. This Court and the Sixth Circuit in fact relied on many– although not all– of those inferences when evaluating the agreements relevant to this case. Once those inferences are removed, however, *Tackett* instructs that courts still must employ "ordinary principles of contract law" to assess the parties' intentions-- which "control." *Tackett*, 135 S. Ct. at 933 (quotation marks and citation omitted). This Court committed a palpable error in its September 28, 2015 decision when it cast aside the now outlawed inferences from its previous analysis, but then failed to re-evaluate the relevant agreement according to those ordinary principles of contract law. Having done so now, the Court finds at least an ambiguity with respect to whether the parties intended Plaintiffs' health insurance benefits to vest. Accordingly, the Court may look to extrinsic evidence to ascertain their intent. As this Court has previously discussed and held, the extrinsic evidence supports a finding that the parties intended to grant Plaintiffs vested, lifetime retiree health insurance coverage. Therefore, the Court is granting Plaintiffs' motion for reconsideration and vacating its September 28, 2015 Judgment in favor of CNH.

Having reached this conclusion, the Court now must address the issue for which the Sixth Circuit remanded the matter: a determination of whether CNH may make the changes it proposes to those vested benefits.

See Reese v. CNH Am. LLC, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*").

II. Cross-Motions for Summary Judgment on the Issue of Reasonableness

Following *Reese II*, CNH submitted a new plan proposing changes to Plaintiffs' health insurance benefits and the parties engaged in discovery relating to the factors the Sixth Circuit instructed this Court to consider on remand in assessing the plan's reasonableness. In April 2014, after the conclusion of discovery, the parties filed cross-motions for summary judgment with respect to the reasonableness of CNH's proposed plan. (ECF Nos. 419, 423.) In addition, Plaintiffs filed a motion to strike the declarations of defense experts John F. Stahl and Scott J. Macey. (ECF No. 428.)

The *Reese II* panel instructed this Court as follows regarding its task on remand– a task that the panel described as a "vexing one," *Reese II*, 694 F.3d at 686:

> To gauge whether CNH has proposed reasonable modifications to its healthcare benefits for retirees, the district court should consider whether the new plan provides benefits "reasonably commensurate" with the old plan, whether the changes are "reasonable in light of changes in health care" (including access to new medical procedures and prescriptions) and whether the benefits are "roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326. In doing so, the district court should take evidence on the

following questions (and others it considers relevant to the reasonableness question):

- [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
- [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
- [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
- [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
- [5] What difference (if any) is there between the quality of care available under the old and new plans?
- [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
- [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. at 685-86. The first five considerations focus on whether CNH's proposed plan to change Plaintiffs' retiree health insurance benefits is "reasonably commensurate" with the current plan. The sixth consideration focuses on whether the benefits provided under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees." Finally, the seventh consideration focuses on whether the proposed changes are 'reasonable in light of changes in health care." The Court addresses these issues in turn.[3]

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[3] Before proceeding, the Court addresses Plaintiffs' motion to strike the declarations of defense experts John F. Stahl and Scott J. Macey. Plaintiffs argue that the declarations should be stricken because: (1) they exceed the scope of previously-submitted declarations; (2) they exceed the scope of, and are inconsistent with, Stahl's and Macey's deposition testimony; (3) statements made by Stahl and Macey in their declarations are not based on personal knowledge; and (4) the declarations otherwise do not meet the requirements of the Federal Rules of Evidence. CNH opposes each argument and urges the Court to deny Plaintiffs' motion. Because the Court ultimately is granting summary judgment in favor of Plaintiffs and against CNH, the Court construes the facts throughout this Opinion in the light most favorable to CNH. In doing so, the Court considers the declarations (with one exception specifically noted). As the declarations do not change the result, the Court is denying Plaintiffs' motion to strike as moot.

A. Is the Proposed Plan "Reasonably Commensurate" with the Current Plan?

1. Analysis[4]

In considering whether CNH's proposed plan is "reasonably commensurate" with the current one, the Court is cognizant of the definition of "commensurate." One dictionary defines the word as "equal in measure or extent" and "corresponding in size, extent, amount, or degree." Webster's Ninth New Collegiate Dictionary 264 (1991). Synonyms for "commensurate" are:

> Proportionate (she was not paid commensurate with her experience and ability). Corresponding, compatible, in accord, fitting, on a proper scale, commensurable, parallel, appropriate, equivalent, in keeping with, relative, analogous, synchronous, coordinate, coterminous, adequate, equal, on a scale suitable, coextensive, balanced, symmetrical, congruous, matching, in agreement, comparable, consistent, due.

William Statsky, West's Legal Thesaurus Dictionary: Special Deluxe Ed. 151 (1986).

Considerations [1] and [4], above, require the Court to compare the average total out-of-pocket costs to retirees under both plans, now and in the future. The average annual out-of-pocket cost to pre-Medicare participants under the current plan is $269 in 2015,

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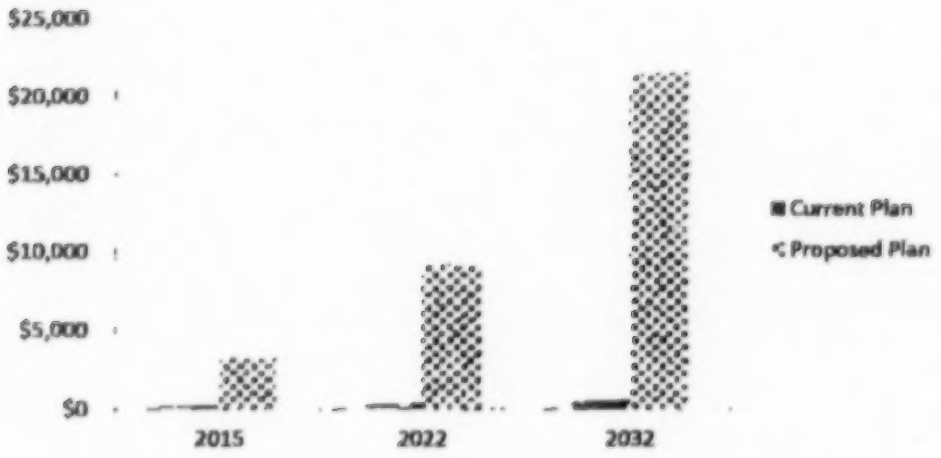
[4] All of the data discussed in this section of the Opinion is supplied by CNH's expert, John F. Stahl, a senior consulting actuary at Towers Watson. In construing the facts in the light most favorable to CNH, the Court assumes the accuracy of the data Stahl provides.

$377 in 2022, and $596 in 2032.[5] The average annual out-of-pocket cost to pre-Medicare participants under the proposed plan (including annual premium contributions) is estimated at $3,286 in 2015, $9,345 in 2022, and $21,615 in 2032. Under the current plan, pre-Medicare participants would pay less than 1.5% of the plan costs, with CNH paying over 98.5% of the plan costs, every year from now until at least 2032. Under the proposed plan, pre-Medicare participants would pay 19.2% of the costs of the plan in 2015, with CNH paying 80.8%. In 2022, pre-Medicare participants would pay 34.9% of the plan costs, with CNH paying 65.1%; and in 2032, pre-Medicare participants would pay 46.8% of the costs of the plan, with CNH paying 53.2%. The following chart and graph illustrate the data discussed in this paragraph:

Comparison of Out-of-Pocket Costs to Pre-Medicare Participants Under Current and Proposed Plans

	Current Plan		Proposed Plan	
	Average Annual Out-of-Pocket Cost of Retiree	Share of Costs Paid by Retiree	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree
2015	$269	1.5%	$3,286	19.2%
2022	$377	1.5%	$9,345	34.9%
2032	$596	1.5%	$21,615	46.8%

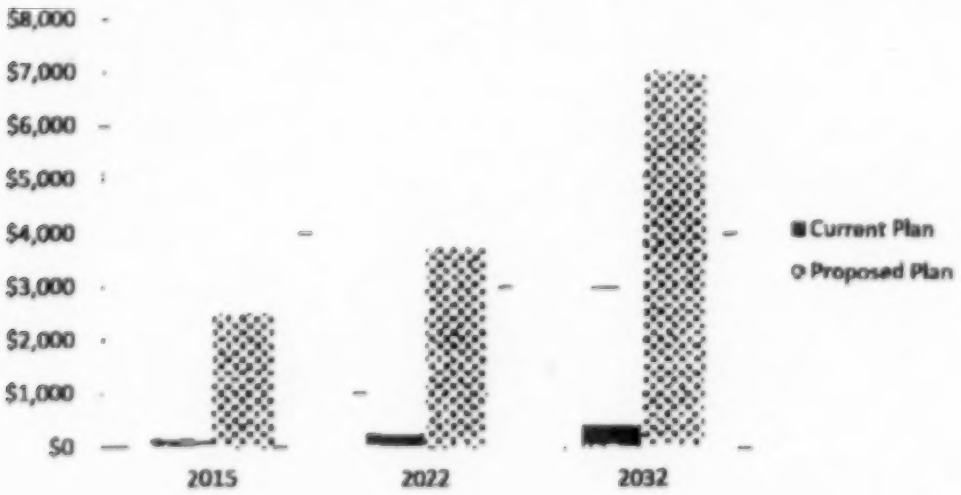
[5] Retirees make no premium contributions under the current plan.



The average annual out-of-pocket cost to Medicare-eligible participants under the current plan is $159 in 2015, $239 in 2022, and $417 in 2032. The average annual out-of-pocket cost to Medicare-eligible participants under the proposed plan (including annual premium contributions) is estimated at $2,512 in 2015, $3,735 in 2022, and $7,017 in 2032. Under the current plan, Medicare-eligible participants would pay less than 3% of the plan costs, with CNH paying over 97% of the plan costs, every year from now until at least 2032. Under the proposed plan, Medicare-eligible participants would pay 64.5% of the costs of the plan in 2015, with CNH paying 35.5%. In 2022, Medicare-eligible participants would pay 69% of the plan costs, with CNH paying 31%; and in 2032, Medicare-eligible participants would pay 74.9% of the costs of the plan, with CNH paying only 25.1%. The following chart and graph illustrate the data discussed in this paragraph:

Comparison of Out-of-Pocket Costs to Medicare-Eligible Participants Under Current and Proposed Plans

	Current Plan		Proposed Plan	
	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree
2015	$159	2.7%	$2,512	64.5%
2022	$239	2.7%	$3,735	69%
2032	$417	2.6%	$7,017	74.9%

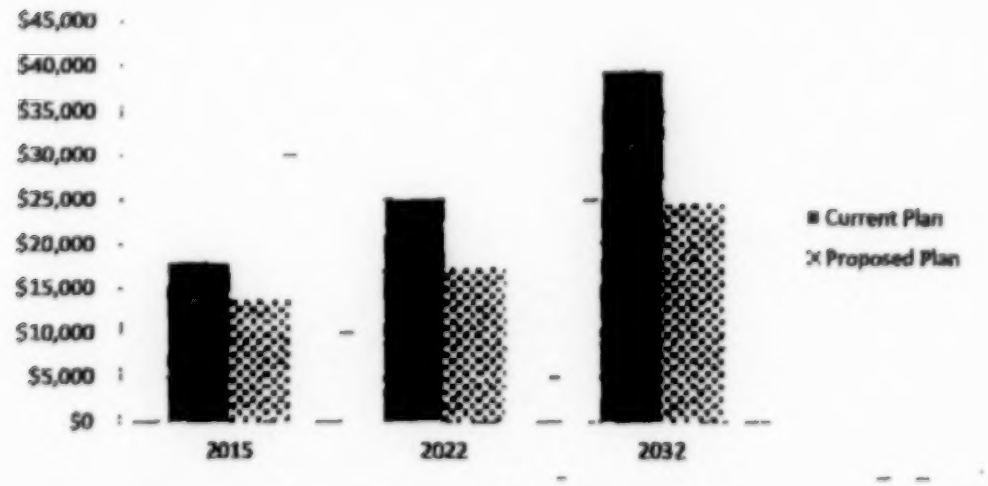


Considerations [2] and [4], above, require the Court to compare the average per-beneficiary cost to CNH under the current and proposed plans, now and in the future. CNH's costs under the current plan for each pre-Medicare participant are projected to be $17,935 in 2015, $25,148 in 2022, and $39,749 in 2032. Under the

proposed plan, CNH's costs for each pre-Medicare participant are projected to drop to $13,871 in 2015, $17,407 in 2022, and $24,570 in 2032. This data is illustrated in the following chart and graph:

Average Annual Costs to CNH of Each Pre-Medicare Participant

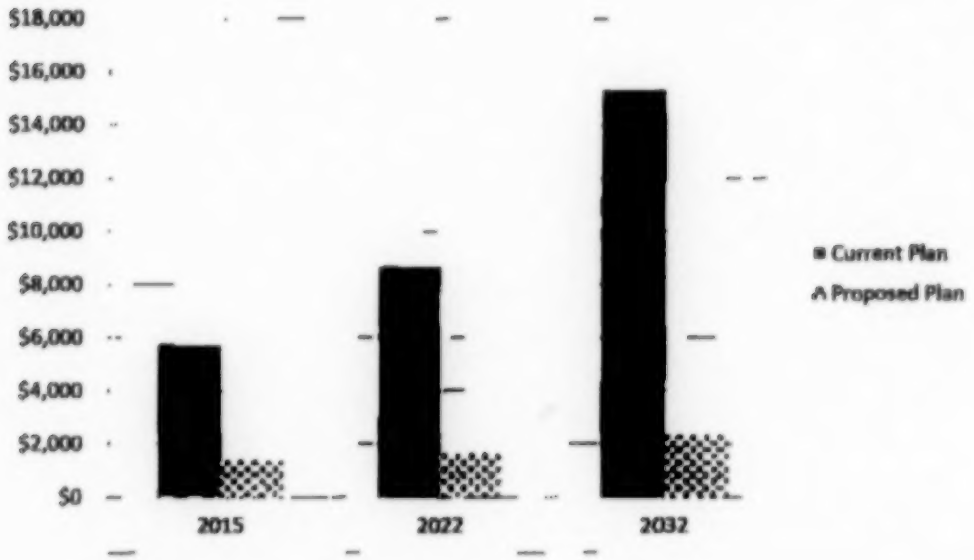
	Current Plan	Proposed Plan	Savings Per Participant
2015	$17,935	$13,871	$4,064
2022	$25,148	$17,407	$7,741
2032	$39,749	$24,570	$15,179



CNH's costs under the current plan for each Medicare-eligible participant are estimated to be $5,752 in 2015, $8,701 in 2022, and $15,322 in 2032. Under the proposed plan, CNH's costs for each Medicare-eligible participant drop dramatically to $1,380 in 2015, $1,681 in 2022, and $2,352 in 2032. This data is illustrated in the following chart and graph:

Average Annual Costs to CNH of Each Medicare-Eligible Participant

	Current Plan	Proposed Plan	Savings Per Participant
2015	$5,752	$1,380	$4,372
2022	$8,701	$1,681	$7,020
2032	$15,322	$2,352	$12,970



Consideration [3], above, requires the Court to compare the premiums, deductibles, and copayments that participants must pay under the current and proposed plans. The Court addresses the related concepts of coinsurance and out-of-pocket maxima, as well.

Premiums. Retirees make no premium payments under the current plan. The proposed plan imposes premium sharing under which participant premium payments grow each year. According to CNH's data, the proposed plan calls for premium contributions in

2015 of $1,410 per year for pre-Medicare retirees and $120 per year for Medicare-eligible retirees, compared to no premiums under the current plan. In subsequent years, premium contributions under the proposed plan increase by 60% of the total cost increase of retiree medical coverage from one year to the next. According to CNH's data, annual premium contributions for pre-Medicare participants will be $6,714 in 2022 (compared to $0 under the current plan) and $17,458 in 2032 (again, compared to $0 under the current plan). For Medicare-eligible participants, premium contributions will be $572 in 2022 (compared to $0 under the current plan) and $1,578 in 2032 (again, compared to $0 under the current plan). The following chart illustrates this data:

Annual Premium Requirements Under the Current and Proposed Plans

	Current Plan		Proposed Plan	
	Pre-Medicare Retirees	Medicare-Eligible Retirees	Pre-Medicare Retirees	Medicare-Eligible Retirees
2015	$0	$0	$1,410	$120
2022	$0	$0	$6,714	$572
2032	$0	$0	$17,458	$1,578

Deductibles, Copayments, Coinsurance, and Out-of-Pocket Maxima.

Under the current plan, there are no deductibles for in-network services, and either no copayment or a $5 copayment for almost all services, after which 100% of the cost of the service is covered. For out-of-network services under the current plan, there is a $100 per

person, $300 per family deductible, after which insurance pays for 80% of the reasonable and customary charges for almost all services. The out-of-pocket maximum for out-of-network services is $1,000 per person and $2,000 per family.

Under the proposed plan, pre-Medicare participants would pay a $200 per person, $400 per family deductible for in-network services, after which insurance would pay 85% of the reasonable and customary charges for most services, except there is no coinsurance and a $20 copayment for routine office visits and preventive care (allergy treatments, chiropractic, gynecologic exams, mammograms, primary care, mental health treatment, etc.). There is a $1,000 per person, $2,000 per family out-of-pocket maximum; copayments and deductibles do not count toward meeting the out-of-pocket maximum.

For out-of-network services for pre-Medicare participants under the proposed plan, there is a $500 per person, $1,000 per family deducible, after which insurance would pay 65% of the reasonable and customary charges for almost all services, including routine office visits and preventive care. There is a $2,000 per person out-of-pocket maximum.

Medicare-eligible participants under the proposed plan would pay a $250 per person, $500 per family deducible, after which insurance would pay for 80% of the reasonable and customary charges for almost all services, including most routine office visits (routine physicals are not covered). There is a $1,500 per person, $3,000 per family out-of-pocket maximum; deductibles count toward meeting the out-of-pocket maximum.

The following chart compares the deductibles, copayments, coinsurance, and out-of-pocket maxima under the current and proposed plans.

Material Terms of Healthcare Coverage Under Current and Proposed Plans

	Current Plan – All Retirees	**Proposed Plan – Pre-Medicare Retirees**	**Proposed Plan – Medicare-Eligible Retirees**
Annual Deductibles	*In-network*: $0 *Out-of-network*: $100 individual and $300 family	*In-network*: $200 individual and $400 family *Out-of-network*: $500 individual and $1,000 family	$250 individual and $500 family
Post-Deductible Coverage (Coinsurance)	*In-network*: 100% *Out-of-network*: 80%	*In-network*: 85% *Out-of-network*: 65%	80%
Copayments	$5	$20 (office visits)	None
Annual Out-of-Pocket Maxima	*In-network*: N/A *Out-of-network*:	*In-network*: $1,000 individual and	$1,500 individual and $3,000 family

	$1,000 individual and $2,000 family	$2,000 family *Out-of-network*: $2,000 individual	

Prescription Drug Coverage. Regarding prescription drug coverage, under the current plan, there is a $5 co-pay for a short-term (30 days or less) supply of generic or brand drugs, and no co-pay for a 90-day supply through the mail. Under the proposed plan, prescription drug coverage is entirely eliminated for Medicare-eligible participants. Pre-Medicare participants under the proposed plan would pay a $10, $40, and $60 co-pay for a short-term supply (30 days or less) of generic, formulary, and non-formulary drugs, respectively, and a $20, $80, and $120 co-pay for a long-term supply (30-90 days) of generic, formulary, and non-formulary drugs, respectively. Prescription co-pays do not count toward meeting the plan deductible or out-of pocket maximum. The following chart illustrates this data.

Prescription Drug Coverage Under Current and Proposed Plans

Current Plan – All Retirees	Proposed Plan – Pre-Medicare Retirees	Proposed Plan – Medicare-Eligible Retirees
Generic and Branded: $5 short term	Generic: $10 short term $20 long	No Coverage

$0 long term	Branded	term (formulary): $40 short term $80 long	
	Branded	term (non-formulary): $60 short term $120 long term	

According to the data supplied by CNH's expert, pre-Medicare participants under the proposed plan will pay average annual out-of-pocket costs for prescription medicine of $1,118 in 2015 (compared to $149 under the current plan), $1,568 in 2022 (compared to $209 under the current plan), and $2,478 in 2032 (compared to $331 under the current plan). Medicare-eligible participants will have to look to other sources for prescription coverage, namely, the Medicare Prescription Drug Plan (Part D), and are estimated to pay $2,102 in 2015 (compared to $124 under the current plan), $2,728 in 2022 (compared to $186 under the current plan), and $4,681 in 2032 (compared to $324 under the current plan).

Consideration [5], above, requires the Court to compare the quality of care available under the current and proposed plans. The parties agree that the quality of care is comparable under both plans, except that the quality of care for Medicare-eligible participants is reduced under the proposed plan due to the unavailability of prescription drug coverage for that

class of participants through the plan. Aside from this, the parties agree that both plans cover services that are "medically necessary" for the care of the participant and offer the same suite of benefits.[6]

2. Summary

The Court's analysis of the first five considerations above, all of which bear on whether the proposed plan is "reasonably commensurate" to the current plan, reveals that the plan proposed by CNH bears little resemblance to the current plan from a cost-sharing perspective. In sum, Plaintiffs are far worse off under the proposed plan and the cost-shift proposed by CNH is extreme. In 2015, out-of-pocket costs under the proposed plan are expected to be more than twelve times higher for pre-Medicare retirees than they would be for the same year under the current plan and almost sixteen times higher for Medicare-eligible retirees. By 2032, the numbers become even more staggering. Pre-Medicare retirees are expected to pay out-of-pocket costs under the proposed plan that are more than thirty-six times those which they would be paying in 2032 under the current plan, and Medicare-eligible retirees are expected to pay costs that are almost

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[6] Plaintiffs argue that the quality of care under the proposed plan will deteriorate with each passing year as participant cost of coverage increases, because Plaintiffs will forego medical treatment as it becomes increasingly unaffordable. However, consideration [5] of the *Reese* framework requires the Court to compare the quality of care "available" under both plans. The affordability of those services (i.e., their *practical* availability) is the subject of considerations [1] through [4], discussed above.

seventeen times higher than those they would be paying under the current plan.[7]

In allowing "reasonable" modifications to Plaintiffs' vested healthcare benefits, this Court does not believe the Sixth Circuit had in mind anything near the magnitude of the changes proposed here. "Reasonably commensurate" changes must mean, at a minimum, changes that are not drastic. Because the cost changes proposed here are drastic, the Court does not believe that such changes can even arguably qualify as "reasonably commensurate."

Therefore, the Court concludes that the proposed plan is far from "reasonably commensurate"– or "equal in measure or extent"– to the current plan. Because the issue is not a close one, as CNH has opted to propose a plan that drastically increases retiree costs with no meaningful mitigating benefit, the Court does not believe that this case requires it expand the meaning of "reasonably commensurate," as the parties urge, beyond the dictionary definitions articulated above.

Before proceeding to the next element of the *Reese* framework, the Court notes that CNH's reliance on *Tackett v. M&G Polymers USA, LLC*, 733 F.3d 589 (6th

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[7] The Court is cognizant that the number of pre-Medicare retirees will decrease over time, and that there are expected to be only a handful of retirees remaining in the Class by 2032. However, there is no dispute that there will still be some pre-Medicare retirees in 2032 – thirteen by the parties' estimate. The Court does not ignore these unlucky thirteen retirees in its reasonableness analysis. In 2032, these thirteen retirees are expected to pay shockingly high average annual out-of-pockets costs of $21,615 – $1,801.25 per month – for their healthcare under the Proposed Plan.

Cir. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 926 (2015), is misplaced. In that case, the Sixth Circuit held, with no analysis, that the district court did not clearly err in finding the following modifications to healthcare benefits reasonable under the standard set forth in *Reese*: An increase in the co-pay for generic drugs from $4 to $10, an increase in the annual prescription drug deductible from $175 to $250, and an increase in the out-of-pocket maximum from $500 to $4,000 per family. *Id.* at 601. This aspect of *Tackett*'s holding is not helpful to CNH because the changes proposed by CNH in the present case are, considered cumulatively, more extreme than the changes approved in *Tackett*. Moreover, CNH's reliance on the case overlooks both the deferential standard of review employed by the *Tackett* court and the court's failure to offer any meaningful analysis in support of its conclusory holding.

B. Are the Benefits Under the Proposed Plan "Roughly Consistent With the Kinds of Benefits Provided to Current Employees"?

1. Analysis

Pursuant to consideration [6] of the framework set forth in *Reese*, above, this Court must compare the benefits provided to current CNH retirees with the benefits that would be provided to Plaintiffs under the proposed plan, and determine whether the latter benefits are "roughly consistent with the kinds of benefits provided to current employees."

Current CNH retirees receive their benefits under a CBA which became effective in 2010. The 2010 CBA is materially identical to the parties' prior CBA, which

became effective in 2005. The parties seem to agree that the two plans – the proposed plan and the plan available to current CNH retirees– are roughly equivalent.[8] Because the two plans are roughly equivalent, CNH argues that this consideration of the *Reese* framework militates in favor of approving the proposed plan.

However, Plaintiffs argue that, although the plans themselves are similar, current CNH retirees are better off in terms of their overall healthcare situation than Plaintiffs would be under the proposed plan. Plaintiffs argue that current retirees obtained significant benefit improvements that were successfully bargained-for and awarded under the 2005 and 2010 CBAs– benefit improvements which were meant to offset the effect of the significant reduction in healthcare benefits to individuals retiring under those agreements, and which would not be available to Plaintiffs under the proposed plan. Plaintiffs discuss three mitigating benefits that are available to current retirees but would not be available to Plaintiffs under

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[8] CNH points out that the premiums Plaintiffs would pay under the proposed plan always will be less than the premiums paid under the 2005 and 2010 CBAs by current retirees, as the premiums paid by current retirees began increasing each year since 2005 under an escalating premium schedule (i.e., 60% of the total cost increase of retiree medical coverage from one year to the next) while the premiums that Plaintiffs would pay under the proposed plan would not begin increasing until the proposed plan takes effect. In other words, the premiums paid by current retirees had a "head start" on escalating and thus will always be higher than the premiums paid by Plaintiffs under the proposed plan, which would not begin escalating until the proposed plan becomes effective, if at all.

the proposed plan, arguing that the availability of these improvements to only current retirees and not to Plaintiffs makes the former group of retirees better off than the latter group in terms of their overall healthcare picture.

First, CNH agreed to a pension increase for post-2005 retirees. According to Plaintiffs, current retirees receive $6,000 per year in additional supplemental allowance pension payments until age sixty-two and retirees who have been employed for at least thirty years receive an annual increase in basic pension benefits of $1,746 per year starting at age sixty-two and continuing for life. CNH does not dispute this, although it points out that pension amounts are a function of pension rates and years of service and thus a current retiree who has less years of service may receive a smaller pension than a retiree in Plaintiffs' Class. Nevertheless, CNH does not dispute that pension rates are higher for current retirees than for Plaintiffs.

Second, CNH agreed to increase the monthly Medicare Part B reimbursement benefit by $34.50, from $65.50 per Medicare participant (the amount Plaintiffs now receive) to $100 (the amount current retirees receive). This benefit improvement provides current retirees with an additional $414 per year (or $818 for married couples) beginning at age sixty-five and continuing for life, in order to offset the loss of CNH-sponsored prescription drug coverage for Medicare-eligible retirees. CNH does not dispute this improvement.

Third, CNH agreed to establish and contribute to Retiree Medical Savings Accounts (RMSA). According

to Plaintiffs, CNH contributed a median amount of more than $16,000 for each retiree who retired after May 1, 2005 for a period of six years (i.e., during the term of the 2005 CBA). CNH does not dispute this, but states that it is not obligated to make any future contributions to retiree RMSAs going forward. Plaintiffs do not appear to disagree.

CNH asks the Court to ignore the three improved benefits awarded to current retirees as irrelevant to the analysis required under *Reese* because *Reese* requires a comparison of only the plans, and the improved benefits are not part of the plan. The Court rejects this rigid reading of *Reese*. When directing this Court to compare the healthcare plan offered to current retirees with the proposed healthcare plan, the *Reese* panels may not have contemplated that benefits impacting retiree healthcare affordability could be awarded outside the four corners of the healthcare plans themselves. To consider only the two plans while ignoring other benefits impacting retiree healthcare affordability would result in a distortion of the full retiree healthcare picture.

Plaintiffs argue that the above three benefit improvements, which are available to current retirees but would not be available to Plaintiffs under the proposed plan, place current retirees in a better position than Plaintiffs would be under the proposed plan. However, the exact extent to which current retirees are better off by virtue of the three improvements depends on factors unique to each retiree (years of service, lifespan, etc.) and is difficult to quantify. For example, the three benefit improvements discussed above could have a value of $135,000 over the

lifetime of a current retiree with over thirty years of service who lives until the age of eighty-two. If the employee retired at age fifty, he or she would receive twelve years of supplemental allowance pension payments in the annual amount of $6,000 per year (for a total of $72,000 over twelve years), twenty years of basic pension benefits in the annual amount of $1,746 (for a total of $34,920 over twenty years), seventeen years of increased Medicare Part B reimbursements (for a total of $7,038 over seventeen years), and $16,000 in contributions to an RMSA account. The value of the three benefit improvements would be altogether different for a retiree with a different number of years of service and a different lifespan.

Another complicating factor is that, while current retirees enjoy some degree of benefit improvements that would be not offered to Plaintiffs under the proposed plan, thereby making current retirees better off than Plaintiffs would be under the proposed plan, the extent to which current retirees are better off (which is already unknown, as it depends on the unique circumstances of the retiree) is reduced by virtue of the fact that current retirees pay more for their benefits, through more expensive premiums, than would Plaintiffs under the proposed plan.

2. Summary

As mentioned, this Court's task is to compare the benefits provided to current CNH retirees with the benefits that would be provided to Plaintiffs under the proposed plan, and to determine whether the benefits that would be provided to Plaintiffs under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees." While there is little

difference between the two healthcare plans, the Court cannot ignore the fact that current retirees were awarded improved benefits outside the context of their healthcare plan– benefits that render current retirees better off than Plaintiffs would be under the proposed plan. At the same time, although current retirees are entitled to benefits that are better than those that would be awarded to Plaintiffs, current retirees also pay more for their benefits because their premiums are higher, and will always be higher, than those Plaintiffs would pay under the proposed plan.

The record does not reflect, beyond the next few years, how much less Plaintiffs would pay in premiums under the proposed plan, compared to how much current retirees pay in premiums under the 2005 and 2010 CBAs. Therefore, it is not possible to put a dollar amount on how much Plaintiffs would save in premiums and compare that amount to the value of the improved benefits awarded to current retirees, in order to determine who comes out "on top"– current retirees, who would pay more in premiums but have better overall benefits, or Plaintiffs, who would pay less in premiums but have worse overall benefits.

Assuming that the lifetime value of the improved benefits enjoyed by current retirees is in the same ballpark as the lifetime premium savings that would be enjoyed by Plaintiffs under the proposed plan, and because the healthcare plan offered to current retirees is similar to the proposed plan, the benefits available to Plaintiffs under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees."

C. Are the Proposed Changes "Reasonable in Light of Changes to Health Care"?

1. Analysis

In determining whether the changes proposed by CNH are "reasonable in light of changes to health care," the Court is obligated to consider how the proposed plan compares to plans "available to retirees and workers at companies similar to CNH and with demographically similar employees."[9] Predictably, Plaintiffs argue that the proposed changes are not reasonable in light of changes to healthcare, while CNH takes the opposite position. Also unsurprisingly, both sides have selected comparator plans that support their respective positions. That is, Plaintiffs have selected a comparator plan– one offered by one of CNH's principal competitors, John Deere– which is very similar to the current plan and much less favorable to retirees than the proposed plan. The plan selected by Plaintiffs has no premiums, full coverage for in-network services, higher rates of coinsurance and lower deductibles for out-of-network services, and low copayments for office visits and prescription drugs. CNH has selected several comparator plans– one of which is a plan offered by another of CNH's principal

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[9] Plaintiffs strenuously object to this inquiry, insisting that plans offered by other companies are irrelevant in assessing the reasonableness of the modifications proposed here: "It would be difficult to more completely divorce the reasonableness inquiry from the context of the intent of the parties during collective bargaining, than to introduce the 'other similar companies' comparison as an element of 'reasonableness.'" (ECF No. 419 at Pg ID 14067). The Court agrees with Plaintiffs, but the Sixth Circuit's instructions are clear.

competitors, Caterpillar– which are similar to, or more favorable to, retirees than the proposed plan. The Caterpillar plan features participant premium contribution requirements, higher deductibles and copayments, and lower rates of coinsurance.

CNH does not dispute that the comparator plan selected by Plaintiffs, the John Deere plan, is similar to the current plan.[10] CNH also does not dispute that John Deere is a company that is similar to CNH, with demographically similar employees. Therefore, the Court deems the John Deere plan an appropriate comparator and concludes that the plan supports Plaintiffs' position that the current plan remains reasonable in light of changes to healthcare.

Apparently conceding that the John Deere plan supports Plaintiffs' position, CNH argues that "*Reese* does not require CNH's proposed plan to match the one plan most favorable to retirees" and that the comparator plan on which they principally rely, the Caterpillar plan, "is consistent with the trend in the marketplace toward greater participant cost-sharing." (ECF No. 426 at Pg ID 15530). The problem with CNH's argument is that if *Reese* does not require that the proposed plan match a comparator plan that is *favorable* to retirees, it also cannot require that the

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[10] In his declaration, defense expert Scott Macey makes certain representations about the John Deere plan – representations that Plaintiffs believe make the plan look less favorable to retirees than it is, and representations that Plaintiffs argue are factually incorrect. However, in the pertinent section of their brief opposing Plaintiffs' motion for summary judgment, CNH does not cite Macey's representations about the John Deere plan and do not argue that the John Deere plan is dissimilar to the current plan.

proposed plan match comparator plans, such as the ones selected by CNH, that are *unfavorable* to retirees. Herein lies a problem with consideration [7] of the *Reese* framework requiring a comparison of the proposed plan with plans offered by "companies similar to CNH and with demographically similar employees": There are all kinds of healthcare plans offered by employers– plans like the current plan that are favorable to retirees, and plans like the proposed plan that are not favorable to retirees. Naturally, the proposed plan will compare favorably to some plans and not to others, and the parties will surely locate the plans that support their respective litigation-induced positions and select those plans as comparators. For this reason, comparing the proposed plan to other plans that have been cherry-picked by the parties sheds little or no light on changes in the provision of employer-sponsored healthcare benefits.

As mentioned, CNH relies on a healthcare plan offered by Caterpillar as its principal comparator. Plaintiffs do not dispute that Caterpillar is a company that is "similar to CNH and with demographically similar employees" and that the Caterpillar plan is less favorable to retirees than the proposed plan. However, Plaintiffs argue that the Caterpillar plan is not an appropriate comparator because the unfavorable benefit levels conferred in the Caterpillar plan stem, not from trends in the area of employer healthcare plans, but rather from the unique and contentious bargaining atmosphere and protracted negotiations between the union and Caterpillar.

Plaintiffs submit the declaration of James Atwood, an administrative assistant with UAW who

participated in the negotiations between the union and Caterpillar during the relevant time period. (ECF No. 425-2 at Pg ID 15007-08, ¶¶ 7-11). Atwood states that under the union's 1988 CBA with Caterpillar (and under prior CBAs), retirees received healthcare benefits with no premium contribution requirement. (*Id.* at Pg ID 15008, ¶ 12.) However, beginning in 1991 when the parties began negotiating a successor CBA, the negotiations broke down, employees began to strike, and a lengthy labor dispute ensued, at the beginning of which Caterpillar unilaterally imposed a "cap" on the costs that it would pay for retiree healthcare benefits. (*Id.* at Pg ID 15008-15009, ¶¶ 13-18.)[11] Throughout the labor dispute, which was a particularly litigious period in the relationship between UAW and Caterpillar, Caterpillar refused to eliminate the cap, prompting the union to take steps to address the impact of the cap on current and future Caterpillar retirees. (*Id.* at Pg ID 15009-15010, ¶¶ 19-23.)

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[11] CNH's expert, Scott Macey, suggests in his declaration that UAW and Caterpillar agreed to the cap. (*See* ECF No. 423-22 at Pg ID 14920-21, ¶ 53.) However, unlike Atwood, Macey did not personally participate in the negotiations between UAW and Caterpillar. Because declarations must be based on personal knowledge and nothing in Macey's declaration indicates that he has personal knowledge of what occurred during the negotiations between UAW and Caterpillar, the Court disregards that portion of Macey's declaration as unreliable. *See* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge . . ."); *Duke v. Nationstar Mortg., LLC*, 893 F. Supp. 2d 1238, 1244 (N.D. Ala. 2012) ("An affidavit or declaration based on anything less than personal knowledge is insufficient. . . . Additionally, the affidavit or declaration must state the basis for such personal knowledge.").

According to Atwood, in 2005, "the UAW was able to secure Caterpillar's agreement to vastly improve benefits for retirees and their dependents," including increased pension benefits, lump sum payments to existing retirees and surviving spouses, retirement bonuses, and increased Medicare Part B premium reimbursements– all benefits that were meant to offset an increase in retiree out-of-pocket healthcare costs. (*Id.* at Pg ID 15010-15013, ¶¶ 24-25, 28-29.)

In light of the turbulent and unique bargaining history between UAW and Caterpillar, Plaintiffs argue that the Caterpillar plan is not an appropriate comparator because the benefit levels offered under the plan are a function of the distinct bargaining factors and dynamics between Caterpillar and the union, and not healthcare plan trends among companies similar to CNH. Plaintiffs' argument highlights two additional problems with consideration [7] of the *Reese* framework calling for a comparison between the proposed plan and plans offered by similar companies. First, although the inquiry is whether the proposed modifications are "reasonable in light of changes to health care"– an inquiry that is meant to take into account the degree to which the proposed modifications are consistent with trends in the area of employer-sponsored healthcare benefits– the level of benefits awarded under a given plan may have less to do with the climate the inquiry is meant to consider than with other factors that do not reflect trends in healthcare. Stated differently, it is difficult to determine the extent to which the benefit levels in a plan reflect healthcare trends as opposed to other factors that are irrelevant to the task at hand.

Second, examining a healthcare plan in a vacuum may not paint an accurate and complete picture of how well-off retirees are in terms of their healthcare situation. This is because benefits awarded outside the context of the plan factor into the calculus, as well, and those other benefits, assuming the Court may permissibly consider them under the nebulous *Reese* framework, may escape detection. For example, a healthcare plan with high participant costs may not translate into overall high participant healthcare costs if the high costs called for under the plan are mitigated through other benefits awarded outside the plan. And the opposite also is true: A healthcare plan calling for low participant costs may not mean participant healthcare costs are low if less generous benefits are awarded outside the plan.

The Caterpillar plan on which CNH relies seems to implicate all of these concerns, calling into question whether the plan reflects the reality of the present-day healthcare market. Moreover, although the principal comparator plan on which CNH relies is the Caterpillar plan, they also discuss many other comparator plans, including plans offered by AT&T, Ford, General Motors, U.S. Steel, Goodyear, and the federal judiciary. According to CNH, these entities have implemented a cost-sharing approach similar to the approach taken in the proposed plan and the benefit levels under these plans are similar to, or less generous than, the benefit levels offered in the proposed plan. In addition, CNH cites a study in which Towers Watson, CNH's benefit consultant, compared the proposed plan with data aggregated in its database of nearly 900 employers. CNH states that the proposed plan is more favorable to retirees than the plans offered by at least 75% of the

nearly 900 employers surveyed from the perspective of the participants.

In their response brief, Plaintiffs vigorously attack the utility of CNH's information. Plaintiffs state that the comparator companies on which CNH relies are not companies that are "similar" to CNH and are thus not appropriate comparators. Plaintiffs also argue that the Towers Watson comparison is "devoid of meaning" for many reasons, including the following: (1) the study purposefully excludes unionized employers with collectively bargained plans, despite the availability of a database compiling information on such plans; (2) the study includes only plans that are provided to active employees and not plans that are provided to retirees; and (3) the database was not designed to find companies in the same industry as CNH. Plaintiffs are correct.

Reese instructed the parties and this Court to compare the proposed plan with plans offered at "companies similar to CNH and with demographically similar employees." Accordingly, the Court deems irrelevant plans offered by companies that are not shown to be "similar" to CNH with "demographically similar employees." CNH does not explain how entities like AT&T, Ford, General Motors, U.S. Steel, Goodyear, and the federal judiciary are similar to CNH with demographically similar employees. In addition, because the Towers Watson study analyzes plans offered by nearly 900 employers and there has been no showing that all 900 companies included in the study are "similar to CNH" and have "demographically similar employees," the study is irrelevant.

2. Summary

In sum, comparing the proposed plan to plans offered by "companies similar to CNH and with demographically similar employees" does not shed light on whether the modifications proposed by CNH are "reasonable in light of changes to health care." Among the many plans offered by employers, the parties have merely selected plans that match their respective litigation positions. Plaintiffs selected a plan that is similar to the current plan and CNH selected plans similar to the proposed plan. Even putting aside the cherry-picking concern, the full participant benefit picture cannot be gleaned from an examination of the healthcare plans alone, as benefits bearing on retiree healthcare costs are sometimes conferred outside the context of the healthcare plan. Moreover, the process by which employee benefits are negotiated is a give-and-take process under which the bargaining parties may agree to forego healthcare benefits in exchange for other types of benefits, or bolster healthcare benefits in exchange for benefit reductions in other areas. Given these practical bargaining realities, the level of healthcare benefits on which the bargaining parties finally settle provides little insight on healthcare trends.

D. Conclusion

The Court has considered whether the proposed plan provides benefits that are "reasonably commensurate" with the current plan, whether the benefits are "roughly consistent with the kinds of benefits provided to current employees," and whether the proposed changes are "reasonable in light of changes in health care." Regarding the first

consideration, the proposed plan imposes a massive cost-shift from CNH to the retirees and is far from "reasonably commensurate" with the current plan. If approval of CNH's plan modifications requires satisfaction of all three elements of the *Reese* reasonableness framework,[12] the Court rejects CNH's proposed changes based solely on CNH's failure to satisfy this first element.

However, even if this Court is wrong about the conjunctive nature of the reasonableness framework and the *Reese* panels envisioned a balancing approach whereby failure to satisfy one element should not necessarily result in the rejection of CNH's proposed modifications, the Court still rejects CNH's proposed modifications. The first element of *Reese*'s reasonableness framework weighs strongly in favor of rejecting the proposed changes, so much so that the Court believes a strong showing by CNH on the remaining elements of the *Reese* framework would be necessary to tilt the balance in favor of approving the proposed changes. CNH has failed to make such a showing.

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[12] *Reese* "construed [the 1998 CBA] to permit modifications to benefits plans that are 'reasonably commensurate' with the benefits provided in the 1998 CBA, 'reasonable in light of changes in health care' and roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326 (quoting *Zielinski*, 463 F.3d at 620); *see also Reese II*, 694 F.3d at 685. Based on the panel's use of conjunctive language to articulate the test, the Court believes that the proposed modifications, to be approved, must satisfy all three elements comprising the reasonableness framework and that failure to satisfy one of the elements requires rejection of CNH's proposed modifications.

With regard to the second element, whether the proposed benefits are "roughly consistent with the kinds of benefits provided to current employees," it is impossible to discern precisely how much better or worse Plaintiffs would be under the proposed plan, as compared to current retirees under the 2005 and 2010 CBAs. Nevertheless, it appears that the two classes of retirees are in roughly similar positions in terms of their healthcare situation. Because the evidence does not support a finding that one class is significantly better or worse than the other, this element of the *Reese* framework does not weigh strongly in favor of approving or rejecting the proposed modifications.

Regarding the third element of *Reese*'s reasonableness framework, whether the proposed changes are "reasonable in light of changes in health care," the relevant inquiry mandated by *Reese*– a comparison between the proposed plan and "plans available to retirees and workers at companies similar to CNH and with demographically similar employees"– is problematic as a practical matter for all the reasons explained above. This inquiry does not shed light on whether the proposed changes are "reasonable in light of changes in health care." In any event, putting aside the utility of this inquiry, CNH has not shown that the proposed modifications are consistent with plans offered by "companies similar to CNH and with demographically similar employees" any more than Plaintiffs have shown that the proposed modifications are inconsistent with plans offered by "companies similar to CNH and with demographically similar employees." This element does not weigh strongly in support of either side.

For these reasons, the Court concludes that the modifications proposed by CNH are not reasonable under *Reese*'s reasonableness framework and rejects the modifications. CNH argues that the Court should sever the proposed modifications it finds unreasonable and approve the remainder of the modifications. Conversely, Plaintiffs argue that the Court should consider the proposed plan as a whole and not approve or reject it in parts. Nothing in the *Reese* decisions informs the debate on this issue.

Even if CNH is correct that this Court has authority to consider each modification separately, approving the reasonable proposed changes and rejecting the unreasonable ones, CNH does not argue that the Court must do so, and the Court declines to adopt this approach. As Plaintiffs correctly point out, the piecemeal approach urged by CNH, if adopted, would encourage employers to request modifications that are unreasonable, knowing that they can rely on a court to separately examine each proposed modification and tweak it so that it falls just within the hazy category of "reasonable." It is not the role of a court to write or rewrite a healthcare plan, and incentivizing employers to suggest reasonable modifications while believing them to be unreasonable arguably encourages bad faith conduct. In addition, courts lack the expertise necessary to fashion the specifics of a healthcare plan. The Court does not believe *Reese* requires, or even contemplates, judicial scrutiny into such minute, yet important, plan details.

For all of the reasons stated above,ok

IT IS ORDERED that Plaintiffs' Motion for Reconsideration (ECF No. 447) is **GRANTED** and the

September 28, 2015 Judgment (ECF No. 446) is **VACATED**;

IT IS FURTHER ORDERED that CNH's Motion for Summary Judgment (ECF No. 423) is **DENIED**;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (ECF No. 419) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike (ECF No. 428) is **DENIED AS MOOT**.

Date: November 9, 2015

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 04-CV-70592
Honorable Patrick J. Duggan

[Filed September 28, 2015]

JACK REESE, et al.,

Plaintiffs,

vs.

CNH INDUSTRIAL N.V., et al.,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' LATER-FILED MOTION FOR SUMMARY JUDGMENT (ECF NO. 439) AND DENYING ALL OTHER PENDING MOTIONS AS MOOT (ECF NOS. 413, 423 & 428)

I. INTRODUCTION

This matter is before the Court on remand, for a second time, from the United States Court of Appeals for the Sixth Circuit. In August 2007, the Court granted summary judgment to Plaintiffs on their claim that they are entitled to irreducible retiree healthcare

benefits from Defendants that survive the expiration of the pertinent collective bargaining agreement ("CBA"), which expired in 2004. *See Reese v. CNH Global N.V.*, No. 04-CV-70592, 2007 WL 2484989 (E.D. Mich. Aug. 29, 2007). The Sixth Circuit affirmed the Court's holding that Plaintiffs are entitled to *some* healthcare benefits that survive the expiration of the CBA, holding that Defendants may not terminate *all* healthcare benefits for retirees, but determined that the scope of the benefits can be reasonably altered. The *Reese I* panel remanded the action to this Court to determine how and in what circumstances benefits may be altered. *See Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009) ("*Reese I*").

On remand, this Court again granted summary judgment to Plaintiffs, concluding that Defendants could not *unilaterally* change the level of retiree benefits. *See Reese v. CNH Global N.V.*, No. 04-CV-70592, 2011 WL 824585 (E.D. Mich. Mar. 3, 2011). Defendants once again appealed and the Sixth Circuit reversed, holding that Defendants can unilaterally reduce retiree benefits as long as the changes are reasonable. *See Reese v. CNH Am. LLC*, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*"). The Sixth Circuit remanded for a determination whether the changes proposed by Defendants satisfy the reasonableness criteria that the panel articulated in *Reese II*.

Back in this Court for the third time, the parties filed cross-motions for summary judgment addressing the reasonableness of Defendants' proposed changes (ECF Nos. 419 & 423). Plaintiffs argue that the proposed changes are unreasonable; Defendants argue the opposite. In addition, Plaintiffs filed a motion to

strike the declarations of two defense experts (ECF No. 428), which were submitted in support of Defendants' motion for summary judgment. The Court held oral argument on these motions on February 3, 2015.

Three weeks after oral argument, Defendants filed a second motion for summary judgment, arguing that Plaintiffs are not entitled to *any* healthcare benefits lasting beyond the expiration of the CBA in light of the United States Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), which was issued earlier this year during the pendency of these second remand proceedings. Defendants contend that the conclusion of this Court and the Sixth Circuit that Defendants may not terminate retiree healthcare benefits is no longer viable in light of *Tackett*.

Defendants' second summary judgment motion is fully briefed and the Court will dispense with oral argument. *See* E.D. Mich. LR 7.1(f)(2). For the reasons that follow, the Court agrees with Defendants that the previous determination that Plaintiffs are entitled to healthcare benefits lasting beyond the expiration of the CBA is no longer correct in light of *Tackett*. Constrained by the Supreme Court's decision, the Court has no choice but to grant Defendants' second summary judgment motion. Because Plaintiffs' retiree healthcare benefits do not survive the expiration of the CBA in light of *Tackett*, the Court does not consider whether Defendants' proposed changes to those benefits are reasonable, as that issue is now moot. Accordingly, the Court will deny as moot the parties' cross-motions for summary judgment and Plaintiffs' motion to strike.

II. BACKGROUND

A. Factual

The factual background of this case is well-known to the parties and the Court and is not repeated here. The reader is directed to the citations contained in the opening two paragraphs of this Opinion and Order for a detailed recitation of the facts.

B. Procedural

This case was filed in February 2004, almost twelve years ago. In August 2007, this Court granted summary judgment in favor of Plaintiffs, holding that they are entitled to irreducible lifetime healthcare benefits under the terms of the CBA in effect at the time of their retirement ("1998 CBA").[1]

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[1] The Court avoids the use of the word "vested" in this Opinion and Order because the precise meaning of that word is unclear in light of the Sixth Circuit's decisions in *Reese*. Prior to those decisions, "vested" benefits referred to benefits that last forever *at a fixed level*. *See, e.g.*, *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 92 S. Ct. 383, 398 n.20 (1971) ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed."); *Moore v. Menasha Corp.*, 690 F.3d 444, 450 (6th Cir. 2012) ("An employer that contractually obligates itself to provide vested healthcare benefits renders that promise 'forever unalterable.'"); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006) ("If a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation."); *Int'l Union v. Loral Corp.*, 107 F.3d 11 (Table), 1997 WL 49077, at *2 (6th Cir. Feb. 3, 1997) (unpublished) ("The primary question . . . is whether the parties to

On appeal, a panel of the Sixth Circuit consisting of Judges Sutton, Gibbons, and Ryan affirmed this Court's holding that Plaintiffs are entitled to lifetime healthcare benefits under the 1998 CBA. However, the panel raised an issue that was not addressed by the parties, that being: "What does vesting mean" in the context of this case? *Reese I*, 574 F.3d at 321. The panel determined that, while the CBA is properly interpreted to prohibit the altogether elimination of retiree healthcare benefits, there is nothing in the CBA evincing a promise to forever maintain lifetime benefits at the same level. Because the panel found nothing in the CBA preventing Defendants from altering benefits, so long as they did not entirely eliminate them, it looked to other evidence to determine whether the parties intended the level of benefits to remain the same forever.[2]

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the relevant agreements intended the benefits to 'vest,' i.e., to remain at the same level for the lifetime of the beneficiary."). However, the *Reese* panels appear to have changed the definition of "vested" inasmuch as they use that word to describe benefits that, while lasting for life, are subject to unilateral reduction. *See Reese I*, 574 F.3d at 321-22, 324; *Reese II*, 694 F.3d at 683-84. Rather than use a word with an uncertain or imprecise meaning, the Court uses other words (e.g., "lifetime," "forever," "for life," "irreducible," "at the same level," etc.) to describe the duration and scope of retiree benefits.

[2] A panel of the Sixth Circuit previously rejected the notion that an employer may unilaterally reduce lifetime healthcare benefits unless there is an agreement allowing such unilateral action. *See Loral Corp.*, 1997 WL 49077, at *3 ("[I]f the employer retained discretion to cut [healthcare] benefits somewhat, there is nothing to give us a standard by which to distinguish a 1% cut from a 99% cut that would be virtually equivalent to a complete revocation. It might well be sensible for parties to agree to allow the employer to

Examining other evidence, the panel concluded that the parties did not view the promised benefits as forever unalterable. To reach that conclusion, the panel relied principally on one special fact or "historical feature" of this case. Specifically, the panel found that the 1998 CBA modified the healthcare benefits available to prior retirees who retired under earlier CBAs, without the consent of the prior retirees and in a manner that disadvantaged the prior retirees. In light of this factual finding, the panel concluded that it must have been the understanding of the parties that the 1998 CBA, which included the same language as the earlier CBAs, created lifetime healthcare benefits that could be unilaterally reduced without the consent of the retirees. Crucial to the panel's conclusion that the parties viewed the benefits as subject to possible future unilateral reduction was the panel's determination that the benefits of prior retirees had been unilaterally *reduced* in the past; the panel acknowledged that, had the benefits been *improved* in the past without the consent of the prior retirees, "[t]hat sort of change would not break any promises to provide irreducible benefits for life." *Reese I*, 574 F.3d at 325. Critically, however, this Court never made the crucial factual finding that benefits had been reduced in the past. Rather, that factual determination was made in the first instance by the *Reese I* panel – a clear encroachment on the factfinding function of this Court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92, 102 S. Ct. 1781, 1791-92 (1982) ("[F]actfinding is the

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retain some flexibility to deal with future vicissitudes, but such an arrangement must be agreed to in the contract. It cannot be imposed unilaterally by the employer or the courts.").

basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance [a] factual dispute which had not been considered by the District Court." (internal quotation marks and citation omitted)).

Based in large part on the "historical feature" discussed above, the *Reese I* panel concluded that "CNH . . . cannot terminate all health-care benefits for retirees, but it may reasonably alter them." 574 F.3d at 327. In particular, the panel held that the 1998 CBA "permit[s] modifications . . . that are 'reasonably commensurate' with the benefits provided in the 1998 CBA, 'reasonable in light of changes in health care' and roughly consistent with the kinds of benefits provided to current employees." *Id.* at 326 (quoting *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 619, 620 (7th Cir. 2006)). The panel then remanded the matter "to decide how and in what circumstances CNH may alter such benefits – and to decide whether it is a matter amenable to judgment as a matter of law or not." *Id.* at 327.

In this Court's view, the panel sent conflicting messages regarding one aspect of its decision. Relying on its own factfinding – principally, the finding that prior retiree benefits had been downgraded in the past without the consent of the prior retirees – the panel seemingly concluded that the 1998 CBA permitted unilateral reductions to retiree healthcare benefits. However, Judge Sutton's concurrence to the panel's order denying Plaintiffs' motion for rehearing

significantly confused matters.[3] Using language suggesting an intent to speak on behalf of the panel and offering insight into what the panel envisioned during the remand proceedings, Judge Sutton wrote:

> Plaintiffs also protest our assessment of the factual record arguing that the prior retirees approved the changes to their benefits or at the least that they helped them overall. But this argument overlooks the posture of this case – summary judgment – in which the inferences run in favor of the party that lost below: CNH. On remand, the parties are free to develop evidence on this point. That evidence may show that plaintiffs should win as a matter of law because the prior retirees either approved the changes or they did not diminish the nature of the benefits package that existed upon retirement. Or it may show that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language.

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[3] Following *Reese I*, Plaintiffs filed a motion for rehearing, arguing that the panel decided an issue that was not raised by the parties (i.e., "What does vesting mean" in the context of this case?) and misconstrued the record, reaching factual conclusions that were crucial to the panel's holding but that were unsupported by the record.

Reese v. CNH Am. LLC, 583 F.3d 955, 956 (6th Cir. 2009) (Sutton, J., concurring).[4] The parties and this Court were, therefore, given permission to "develop the evidence" on whether "the prior retirees . . . approved the changes" and on whether the previous modifications "diminished the nature of the [prior retirees'] benefits package" – the special fact on which the panel relied to reach the conclusion that this case is not subject to the usual rule that lifetime healthcare benefits are unalterable. In other words, the parties were given express authorization to submit evidence on remand negating the reasoning underlying the panel's conclusion that lifetime healthcare benefits could be unilaterally reduced, a conclusion that Judge Sutton indicated the panel reached as a result of an inference applied in favor of Defendants – an inference that he said could be overcome through the submission of evidence on remand. In sum, the concurrence demonstrates unequivocally that this Court was free on remand to conclude that Defendants could not unilaterally modify the benefits, provided that the evidence offered during the remand proceedings supported the conclusion that the special inferred fact on which the panel relied to reach a contrary conclusion was not, in fact, true.

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[4] On remand, this Court addressed whether it could consider Judge Sutton's concurrence to clarify the panel's decision, even though the other two judges on the panel did not formally join it. Ultimately, the Court concluded that it could and should consider the concurrence in light of the fact that Judge Sutton authored the opinion for the unanimous panel in *Reese I*. *See* 2011 WL 824585, at *7.

On remand, this Court considered the evidence contemplated in the concurrence and reached the conclusion that Defendants could not unilaterally reduce the healthcare benefits conferred to Plaintiffs under the 1998 CBA. In so holding, the Court concluded that the previous modifications, which were reached through the bargaining process, were not disadvantageous to the prior retirees. *See Reese*, 2011 WL 824585, at *8-9. Again, the concurrence authorized the parties to submit evidence on this issue, noting that "[the] evidence may show that plaintiffs should win as a matter of law" if it is proven on remand that "the changes . . . did not diminish the nature of the benefits package that existed upon retirement." *Reese*, 583 F.3d at 956 (Sutton, J., concurring). Having concluded that the changes did not diminish the nature of the benefits package that existed upon retirement, this Court – following the path paved by the guiding words of the concurrence – held that Plaintiffs should prevail as a matter of law.

Defendants appealed again, resulting in another Sixth Circuit decision – *Reese II*. Writing on behalf of himself and Judge Gibbons, Judge Sutton faulted this Court by stating that it "misread" *Reese I* and "disregarded [its] holding that the company may make reasonable modifications to the plaintiffs' healthcare benefits," *Reese II*, 694 F.3d at 685, without mentioning his opinion concurring in the decision to deny a panel rehearing. The panel also adhered to its previous factual finding, made in the first instance by a panel of appellate judges in *Reese I*, that the healthcare benefits of the prior retirees had been reduced in the past. Shockingly, the panel did not address this Court's conclusion on remand – a conclusion that Judge Sutton

contemplated in his concurrence – that the past changes were not a reduction of the prior retirees' benefit package.

Judge Donald dissented. In her dissent, Judge Donald pointed out the errors made by the majority and expressed her belief that *Reese I* should be overruled and judgment entered in favor of Plaintiffs because "CNH may [not] unilaterally modify the scope of Plaintiffs' retirement health benefits under the 1998 CBA." *Reese II*, 694 F.3d at 691 (Donald, J., dissenting).

The *Reese II* panel instructed this Court as follows regarding its task on remand – a task that the panel described as a "vexing one," *Reese II*, 694 F.3d at 686:

> To gauge whether CNH has proposed reasonable modifications to its healthcare benefits for retirees, the district court should consider whether the new plan provides benefits "reasonably commensurate" with the old plan, whether the changes are "reasonable in light of changes in health care" (including access to new medical procedures and prescriptions) and whether the benefits are "roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326. In doing so, the district court should take evidence on the following questions (and others it considers relevant to the reasonableness question):
>
> - [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit

Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?

- [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
- [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
- [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
- [5] What difference (if any) is there between the quality of care available under the old and new plans?
- [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
- [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. at 685-86.

Following the second remand, Defendants submitted a proposed new plan and the parties engaged in discovery relating to the seven considerations listed above. In April 2014, after the conclusion of discovery, the parties filed cross-motions

for summary judgment. In addition, Plaintiffs filed a motion to strike the declarations of two defense experts.

Shortly before the Court heard oral argument on the parties' cross-motions for summary judgment, the Supreme Court issued its decision in *Tackett*, a case that was on appeal from the Sixth Circuit. In that case, the Court held "that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement." 135 S. Ct. at 937 (Ginsburg, J., concurring). In so holding, the Court abrogated the line of cases in the Sixth Circuit, beginning with *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), that applied presumptions or inferences in favor of the conclusion that retiree benefits were intended to survive the expiration of the CBA in situations where the duration of retiree benefits was not explicitly specified in the CBA.

Following the Supreme Court's decision in *Tackett*, Defendants filed a second motion for summary judgment. In their motion, Defendants argue that the reasons underlying the conclusion of this Court and the Sixth Circuit that Plaintiffs are entitled to lifetime healthcare benefits are no longer viable after *Tackett*. According to Defendants, *Tackett* mandates a conclusion that the healthcare benefits promised to Plaintiff do not survive the expiration of the CBA. Plaintiffs disagree, arguing that the reasoning employed by this Court and the Sixth Circuit to conclude that retiree healthcare benefits were intended

to last forever is consistent with the rules of contract interpretation set forth in *Tackett*.

The question at issue in Defendants' second summary judgment motion – whether the conclusion that retirees are entitled to lifetime healthcare benefits remains correct after *Tackett* – is a threshold one. If Defendants are correct that benefits do not survive the expiration of the CBA, then the Court need not decide the issue that is the subject of the parties' earlier-filed cross-motions for summary judgment – whether the changes proposed by Defendants to Plaintiffs' healthcare benefits are reasonable under the standard articulated by the Sixth Circuit in *Reese II*. The Court now addresses *Tackett*'s impact on this Court's earlier determination that Plaintiffs are entitled to healthcare benefits for life.

III. DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT: *TACKETT*'S IMPACT ON THIS CASE

A. The Parties' Arguments

As discussed, the issue raised in Defendants' second motion for summary judgment is whether the Supreme Court's recent decision in *Tackett* impacts this Court's earlier conclusion that Plaintiffs are entitled to healthcare benefits for life. On the one hand, Defendants argue that *Tackett* mandates the conclusion that retiree healthcare benefits do not survive the expiration of the CBA because the Court's contrary conclusion rested on the legal principles grounded in *Yard-Man* that were abrogated by *Tackett*. On the other hand, Plaintiffs contend that *Tackett* does not impact the Court's conclusion that Plaintiffs are

entitled to lifetime benefits because, in reaching that conclusion, this Court relied on only the aspects of the *Yard-Man* framework that remain viable after *Tackett*. For the reasons that follow, the Court believes that Defendants' argument is the more persuasive one.

B. The *Tackett* Decision

Tackett addressed how courts should determine how long retirees are entitled to healthcare benefits when the applicable CBA confers such benefits but does not explicitly specify their duration. The CBA in *Tackett* provided that retirees of a certain age and with a certain level of seniority "will receive" contribution-free benefits, but did not explicitly specify the duration of those benefits. After the expiration of the CBA, the employer began requiring retirees to contribute toward the cost of their health insurance. The retirees sued, alleging that they had a right to free benefits that continued beyond the expiration of the CBA – forever. The employer argued that it was only obligated to provide free benefits during the life of the CBA, but not after its expiration.

Applying the *Yard-Man* framework, discussed below, the Sixth Circuit ruled in favor of the retirees, concluding that they had a right to lifetime benefits. The Supreme Court, however, vacated the Sixth Circuit's judgment, holding that certain aspects of the legal framework used by the Sixth Circuit to interpret the CBA, derived from *Yard-Man* and its progeny, are inconsistent with ordinary principles of contract interpretation.

The aspect of the *Yard-Man* framework that was most heavily criticized in *Tackett* is the application of inferences or presumptions in favor of the conclusion that parties intended to create lifetime benefits. Under the *Yard-Man* framework, if a CBA is silent regarding the duration of benefits, courts could infer that the parties intended them to last for life based on the "context" of labor-management negotiations, *see Yard-Man*, 716 F.2d at 1482 ("[E]xamination of the context in which these [retiree] benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended."), and the general "nature" of retiree benefits, *see id.* ("[R]etiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained."). The Supreme Court concluded that these inferences conflict with ordinary principles of contract interpretation by "placing a thumb on the scale in favor of vesting retiree benefits in all collective-bargaining agreements." *Tackett*, 135 S. Ct. at 935.

In addition to these inferences, *Tackett* faulted the Sixth Circuit's unwillingness to apply general durational clauses, CBA provisions specifying the expiration date of the CBA, to retiree benefits. In *Yard-Man*, the Sixth Circuit concluded that the inferences discussed in the preceding paragraph "outweigh any contrary implications derived from a routine duration clause terminating the agreement generally," *Yard-Man*, 716 F.2d at 1482-83, and, in a subsequent case, held that "a general durational clause says nothing about the vesting of retiree benefits." *Noe v. PolyOne Corp.*, 520 F.3d 548, 555 (6th Cir. 2008). *Tackett* held that the Sixth Circuit's approach – refusing to apply

general durational clauses to retiree benefits conferred in the contract, instead requiring a contract to include a specific durational clause mentioning retiree benefits to prevent vesting – "distort[s] the text of the agreement and conflict[s] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." 135 S. Ct. at 936.

Tackett further criticized *Yard-Man* and its progeny for ignoring "the traditional principle that courts should not construe ambiguous writings to create lifetime promises" and for "fail[ing] to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" 135 S. Ct. at 936-37 (quoting *Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 207, 111 S. Ct. 2215, 2226 (1991)). The Court approved the Sixth Circuit's holding that "'traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation,'" but faulted the Sixth Circuit for concluding that "'the duration of the benefit once clearly conferred is [not] subject to this stricture.'" *Id.* (quoting *Yard-Man*, 716 F.2d at 1481 n.2). According to the Supreme Court, the rule that contract obligations normally cease upon expiration of the contract "does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees," but "a court may not infer that the parties intended benefits to vest for life" "when a contract is silent as to the duration of [those] benefits." *Id.* at 937. In other words, for a court to conclude that the parties intended to confer lifetime benefits for retirees, it must find both that the parties intended to confer retiree benefits, as well as a clear

manifestation of intent from the contract language that they intended to confer them for life; courts may not infer that the parties intended to confer lifetime benefits based simply on the fact that retiree benefits were conferred.

Tackett concluded that the impermissible aspects of the *Yard-Man* framework, discussed above, affected the outcome of the case because the Sixth Circuit relied on the context of labor-management negotiations and the nature of retiree benefits to reach the conclusion that the parties intended to create lifetime benefits. *See id.* Because the Sixth Circuit "framed its analysis from beginning to end in light of the principles it announced in *Yard-Man* and its progeny," the Court remanded the matter to the Sixth Circuit "to apply ordinary principles of contract law in the first instance." *Id.*

In sum, *Tackett* changed the rules governing the analysis of whether parties intended to create lifetime retiree benefits in the following ways:

- Courts may no longer infer that the parties intended to confer lifetime benefits based on the context of labor-management negotiations.
- Courts may no longer infer that the parties intended to confer lifetime benefits based on the nature of retiree benefits.
- Courts may no longer categorically refuse to apply general durational clauses to retiree benefits.
- Courts should give effect to the traditional contract principle that contractual obligations

will cease, in the ordinary course, upon termination of the bargaining agreement.

- Courts should give effect to the traditional contract principle that ambiguous writings should not be construed to create lifetime benefits.

- To conclude that the parties intended to confer lifetime benefits, there must be a clear manifestation of intent, grounded in the contractual language, to confer lifetime benefits.

C. Application of *Tackett*

The rationale underlying this Court's prior determination that Plaintiffs are entitled to lifetime healthcare benefits is consistent with the rules of interpretation pronounced in *Tackett* in some respects, but inconsistent with those rules in other respects. The Court addressed whether Plaintiffs are entitled to lifetime benefits in its decision dated August 29, 2007. *See Reese*, 2007 WL 2484989, at *5-9. In determining that the parties intended to confer lifetime benefits, the Court relied in large part on its decision in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006), a companion case over which this Court presided involving similar claims and a CBA that is nearly identical to the one at issue in the present case. *See Reese*, 2007 WL 2484989, at *6 ("The defendants in *Yolton* raised the same arguments to support their claim that the [parties] did not intend retiree health insurance benefits to vest that CNH presents now. For the same reason this Court rejected those arguments in

Yolton, it rejects them in this case.").[5] In both *Yolton* and the present case, the Court did not infer that the parties intended to create lifetime benefits based on the context of labor-management negotiations or the nature of retiree benefits. In fact, on review of this Court's decision in *Yolton*, the Sixth Circuit explicitly noted that this Court did not apply those inferences:

> [T]here is no indication that the district court applied either a presumption or relied unnecessarily on the *Yard-Man* inference. Citing *Yard-Man*, the district court correctly stated that "courts must apply basic rules of contract interpretation to discern the intent of the parties." *Yolton*, 318 F. Supp. 2d at 465. The district court did mention the inference and noted that Sixth Circuit case law has not repudiated the *Yard-Man* language, but the court's analysis does not in any sense *rely* on an inference. *Id.* at 465-68. Instead, the district court interpreted the language of the agreement and found evidence that the defendants intended to confer lifetime benefits upon the plaintiffs. *Id.* at 466.

Yolton, 435 F.3d at 580 (emphasis in original). Inasmuch as the Court did not apply the impermissible inferences, the Court's analysis is consistent with *Tackett*. However, as explained, the repudiated aspects of the *Yard-Man* framework include more than just the

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[5] Because the Court was tasked in *Yolton* with resolving a motion for preliminary injunction, the relevant legal question there involved the retirees' likelihood of success on the merits as opposed to their actual success on the merits.

inferences related to the context of labor management relations and nature of retiree benefits.

In concluding that the parties intended to confer lifetime benefits to the retirees in *Yolton* and the present case, the Court relied heavily on contract language tying eligibility for contribution-free healthcare benefits to eligibility for pension benefits. Because pension benefits are presumed to last for life, and because eligibility for healthcare benefits is linked to eligibility for pension benefits, the Court concluded that healthcare benefits, like pension benefits, were intended to last for life. *See Yolton*, 318 F. Supp. 2d at 466; *Reese*, 2007 WL 2484989, at *6. However, for the reasons that follow, *Tackett* forecloses reliance on this rationale.

Tackett referenced the tying rationale in the section of the decision addressing how the impermissible aspects of the *Yard-Man* framework affected the outcome of the case, observing that the Sixth Circuit below relied on contract language "tying . . . eligibility for health care benefits to receipt of pension benefits":

> There is no doubt that *Yard-Man* and its progeny affected the outcome here. As in its previous decisions, the Court of Appeals here cited the "context of . . . labor-management negotiations" and reasoned that the Union likely would not have agreed to language ensuring its members a "full Company contribution" if the company could change the level of that contribution. It similarly concluded that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits. And it framed its

> analysis from beginning to end in light of the principles it announced in *Yard-Man* and its progeny.

135 S. Ct. at 937 (citations omitted). This reference to the tying rationale in the Supreme Court's discussion of how the impermissible aspects of the *Yard-Man* framework affected the outcome of the case suggests, as Defendants argue, that the Supreme Court deems the tying rationale to be one of the impermissible aspects of the *Yard-Man* framework. Because the tying rationale was, in the words of the Sixth Circuit, "[of] particular significance" to this Court in concluding that the parties intended to confer lifetime healthcare benefits for retirees, *Yolton*, 435 F.3d at 580, and because, according to Defendants, the tying rationale is no longer sound after *Tackett*, Defendants argue that this Court's decision that Plaintiffs are entitled to lifetime benefits cannot stand.

Before proceeding further, the Court clarifies the precise nature of the tying rationale that was criticized in *Tackett*. *Tackett* suggests that courts should not rely on language "tying . . . *eligibility* for health care benefits to receipt of pension benefits." 135 S. Ct. at 937 (emphasis added). It does not suggest that courts cannot rely on language tying the *duration* of retiree healthcare benefits to the receipt of benefits. There is a difference. An example of the latter is contract language providing that a retiree is entitled to contribution-free healthcare benefits for *as long as* he or she is entitled to pension benefits. If it is settled that retirees are entitled to pension benefits forever, then it would defy logic – and presumably violate ordinary principles of contract interpretation – to hold that the

parties did not intend to confer healthcare benefits for life. Language like this speaks directly to the duration of retiree benefits and there is nothing in *Tackett* suggesting that courts cannot rely on such language.

The view that *Tackett* does not foreclose reliance on language tying the *duration* of contribution-free healthcare benefits to the receipt of pension benefits is shared by the four concurring Justices in *Tackett*. Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg observed in her concurrence: "Because the retirees have a vested, lifetime right to a monthly pension, a provision stating that retirees 'will receive' health-care benefits if they are 'receiving a monthly pension' is relevant to [the vesting] examination," and that she "understand[s] the Court's opinion to be consistent with" that approach. *Id.* at 938 (Ginsburg, J., concurring) (citations to the record omitted).

However, *Tackett* does suggest that courts should not rely on language tying *eligibility* for contribution-free healthcare benefits to the receipt of pension benefits. An example of such language is a provision providing that a retiree is *eligible* for contribution-free healthcare benefits if he or she is receiving pension benefits. This language arguably speaks to how retirees become eligible to *start receiving* free healthcare benefits, not the *amount of time* they *remain entitled* to those benefits. Because *Tackett* admonishes courts not to "construe ambiguous writings to create lifetime promises," 135 S. Ct. at 936, language tying mere eligibility for contribution-free benefits to receipt of pension benefits, as opposed to language tying the duration of contribution-free benefits to receipt of

pension benefits, no longer supports the conclusion that parties intended to create lifetime benefits.

The pertinent contract language here ties *eligibility* for contribution-free healthcare benefits to the receipt of pension benefits: "Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for" healthcare benefits, and "no contributions are required." In light of *Tackett*, this Court now interprets this provision as addressing how retirees and their spouses become eligible to start receiving free healthcare benefits – i.e., retirees are "eligible" for free healthcare benefits if they "retire under" the company's pension plan, and surviving spouses are "eligible" for free healthcare benefits if they are "eligible" to receive the deceased spouse's pension – not the amount of time retirees and their spouses remain entitled to those benefits. Therefore, the tying language used here no longer supports the Court's determination that the parties intended to confer lifetime benefits.

The remainder of the reasons underlying the Court's prior conclusion that Plaintiffs are entitled to lifetime healthcare benefits are either not sufficient on their own to support that conclusion or are no longer viable reasons under *Tackett*. For example, the Court relied on the fact that the contract contained express durational clauses for other categories of benefits but not for retiree healthcare benefits. Relying on *Yard-Man* for the proposition that "the inclusion of specific durational limitations in other provisions . . . suggests that retiree benefits, not so specifically limited, were

intended to survive," 716 F.2d at 1481, this Court in *Yolton* and the present case ascribed no weight to the general durational clauses contained in the contracts and concluded that the absence of a durational clause specifically governing retiree healthcare benefits suggested an intent to confer lifetime benefits. *Yolton*, 318 F. Supp. 2d at 466-67; *Reese*, 2007 WL 2484989, at *6. This reasoning, however, is not compatible with *Tackett*, which: (1) requires a clear manifestation of intent showing that the parties intended to confer lifetime benefits, *see* 135 S. Ct. at 936-37, (2) admonishes courts not to ignore general durational clauses, *see id.* at 936, and (3) requires courts to "consider the traditional contract principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (quoting *Litton*, 501 U.S. at 207, 111 S. Ct. at 2226).

There is a disagreement among the parties whether "clear and express" contract language is necessary under *Tackett* to show an intent to confer lifetime benefits. On the one hand, Defendants contend that *Tackett* quoted with approval language from a Sixth Circuit case stating that "'the intent to vest must be found in the plan documents and must be stated in clear and express language.'" *Tackett*, 135 S. Ct. at 937 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)). Defendants also point to *Tackett*'s statement that "'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" *Id.* (quoting *Litton*, 501 U.S. at 207; 111 S. Ct. at 2226). On the other hand, Plaintiffs emphasize the observation of the concurring Justices that they "understand the Court's

opinion to be consistent" with the principle that "no rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest." *Id.* at 938 (Ginsburg, J., concurring).

Regardless of whether *Tackett* requires "clear and express" language to show an intent to confer lifetime benefits, the Court believes, at a minimum, that a court must find a clear manifestation of intent, evinced in the language of the contract, before concluding that the parties intended to confer lifetime benefits. *See* 135 S. Ct. at 936-37 (criticizing the *Yard-Man* principle that "a clear manifestation of intent" is required to "confer[] a benefit or obligation" but not required to discern "the duration of the benefit once clearly conferred"). Applying the rules of interpretation articulated in *Tackett*, the Court does not find a clear manifestation of intent to confer lifetime benefits in this case.

Finally, the Court rejects Plaintiffs' argument that the "law of the case" doctrine prevents the Court from revisiting its prior decision that the parties intended to confer upon Plaintiffs lifetime healthcare. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 2017 (1997). As Defendants correctly point out, an exception to doctrine applies here. *See id.* ("Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent"); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (doctrine

does not apply "where a subsequent contrary view of the law is decided by the controlling authority").[6]

For all these reasons, the Court concludes that its prior determination that the parties intended to confer lifetime healthcare benefits is no longer viable in light of the Supreme Court's intervening decision in *Tackett*.

IV. CONCLUSION

For the reasons stated, Defendants' later-filed motion for summary judgment is **GRANTED**; all other pending motions are **DENIED AS MOOT**.

SO ORDERED.

Dated: September 28, 2015

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

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[6] Plaintiffs also argue that the Court should defer ruling on *Tackett*'s impact on this case pending the Sixth Circuit's decision on remand in *Tackett*: "To the extent that this Court has concerns over the impact of *Tackett* on the issue of vesting, this Court should wait for guidance from the Sixth Circuit's review of *Tackett* on remand." Pls.' Resp. at 23 (ECF No. 441). However, Plaintiffs cite no authority supporting this approach and the Court is aware of none.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed August 28, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,	)
Plaintiffs-Appellees,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIALAMERICA, LLC,	)
Defendants-Appellants.	)

ORDER

BEFORE: GIBBONS, SUTTON, and DONALD, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then

were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

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* Judge White recused herself from participation in this ruling.

APPENDIX E

CASE III

Central Agreement

Between

Case Corporation

and

International Union,
United Automobile,
Aerospace and
Agricultural Implement
Workers of America
and

Local Agreement

Local Union No. 1356T
East Moline, Illinois

May 14, 1998

* * *

[Pg. 76]

Section 4. Group Insurance and Pension.

A. The group insurance plan agreed to between the parties will run concurrently with this Agreement and is hereby made part of this Agreement.

* * *

[Pg. 80]

Section 9. Scope of Agreement.

This Agreement disposes of any and all bargaining issues, whether or not presented during negotiations, except with respect to the processing of grievances as provided in Article VII, and shall remain in full force and affect without further change until the expiration thereof.

* * *

[Pg. 81]

ARTICLE XV
TERMINATION

This Agreement (including both Central and Local understandings) shall continue in full force and effect through May 2, 2004 and thereafter from year to year unless sixty (60) days prior to such date either party gives notice in writing of a desire to terminate this Agreement.

* * *

APPENDIX F

CASE / UAW

GROUP BENEFIT PLANS

1998 NEGOTIATIONS

* * *

[Pg. 65]

I. Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension

1) Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a. spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs. All other coverages cease coincident with the date of employment termination due to retirement. (The provisions of this section shall not apply to individuals eligible for or receiving retirement benefits under the deferred vested provisions of the Pension Plan.)

* * *

[Pgs. 78–79]

LETTER OF UNDERSTANDING

Re: National and State Health Insurance Initiatives

This confirms our understanding !hat if, during the term of the 1998 Collective Bargaining Agreement, any Federal or State health security act is enacted or amended to provide hospital, surgical, medical, prescription drug, dental benefits, vision care, or hearing care for employees, retired employees, surviving spouses and dependents, which duplicate or may be integrated with the benefits of the Group Benefits Plan, then in such event, the benefits under the Group Benefits Plan will be modified so as to integrate or eliminate the duplication of such benefits with the benefits provided by such Federal or State law.

If any Federal or State health security act is enacted or amended as provided in the paragraph above, the Company will pay through the term of the 1998 Collective Bargaining Agreement any premiums, taxes or contributions employees may be required to pay under the law when they become effective, that are specifically earmarked or designated for the purpose of financing the program of benefits provided by law, and any savings realized by the Company from integrating or eliminating the duplication of benefits provided under the Group Benefits Plan with the benefits provided by law, shall be retained by the Company. If such tax on employees is based on wages, the Company will pay only the tax applicable to wages received from the Company.

This understanding is conditioned on the Company obtaining and maintaining such governmental approvals as may be required to permit the integration of the benefits under the Group Benefits Plan with the benefits provided by any such law.

International Union, UAW Case Corporation

* * *

LETTER OF UNDERSTANDING

Re: Cost of Healthcare Coverage

During the 1998 contract negotiations the Company and the Union agreed that over the term of the 1998 labor agreement employees and retirees who are enrolled in a Company offered HMO, PPO or other plan will not have to pay any additional employee contributions above those which may be required for enrollment in the Case Network Plan (if any).

The Company will be responsible for the retention of HMOs, PPOs and other health care delivery mechanisms during the term of this agreement. In the event that any offered HMO or PPO does not continue to provide access and high quality, cost effective care on a sustaining basis to Case UAW members, the Company may exercise its right to terminate that provider, provided that a replacement plan is instituted that meets the requirements described below. The Company will give the Union at least ninety (90) days notice of its desire to replace a provider and the Company and Union will work together in the selection of the replacement plan. Any replacement plan will provide comparable benefits and access to the type of plan it replaces. If the replacement plan is an HMO or

PPO it will satisfy the UAW' s standards regarding access and quality for that type of plan.

The same principles will govern the selection of additional (as opposed to replacement) HMOs, PPOs or POS plans to be made available to Case UAW members.

International Union, UAW Case Corporation